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THE STAKE OF THE SCHEDULED AIRLINES IN SOUND AIRPORT DEVELOPMENT
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ANALYSIS OF CIVIL AERONAUTICS BOARD'S PRECEDENTS IN SAFETY ENFORCEMENT CASES
Merrill Armour and Harley G. Moorhead, Jr.

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THE JOURNAL OF
AIR LAW AND COMMERCE

Volume 17 WINTER, 1950 Number 1

THE "AIR COACH" EXPERIMENT AND NATIONAL AIR TRANSPORT POLICY

By HAROLD A. JONES AND FREDERICK DAVIS[1]

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INTRODUCTION

IN the year 1930 two young airmen, Eugene Vidal, a graduate of West Point, and Paul F. Collings, a war pilot, had a bright idea. They believed that an airline could make money from passenger service alone – which had invariably been unprofitable up to that time – if operated on a high-density basis and with costs reduced low enough to permit fares which would be competitive with surface travel. All they needed were backers with money, and they found them in Charles and Nicholas Ludington, who were already interested in civil aviation ventures. Ludington Lines inaugurated service in September 1930 between New York and Washington via Philadelphia – then, as now, a route having a heavy flow of traffic. Ludington used tri-motor Stinson monoplanes, high-density equipment for that time, costing about one-half as much as the Ford tri-motor plane then standard equipment on several of the major airlines. Several new economies were introduced. Only one engine was used in taxiing. After taking off on high-test aviation gasoline the Stinsons switched to regular automobile gasoline in flight, saving four cents a gallon on fuel costs. The fares were only a little more than ordinary train fares, and a fraction of the fares of other airlines. An arrangement was made with the Pennsylvania Railroad for selling tickets and picking up passengers. The operation was an immediate, if modest, success, and marked the first time in aviation history that an airline was able to show a profit on commercial traffic alone, without U. S. mail pay.[2]

[1] The opinions expressed in this article are those of the writers and are not to be attributed to the Civil Aeronautics Board.

[2] SMITH, AIRWAYS, 217-18 (1942).

Along with other interesting pioneering ventures of the period, however, the operation was soon lost in the much bigger and more important struggle for air mail contracts and grandfather certificates, and by the time the Civil Aeronautics Act was passed passenger service was fairly well settled into a standard pattern, with substantially uniform rates. This pattern included the "frills" or luxury items usually associated with air transportation, such as meals without extra charge, hostesses, luxurious aircraft interiors, and advance reservations, which the airlines thought necessary to attract travelers away from other less hazardous methods of transportation. The Ludington experience demonstrates, however, that the "air coach" idea is not a new one but is, in fact, almost as old as commercial airline service itself.

Some of the certificated domestic airlines, with the approval and under the control of the Civil Aeronautics Board, are presently engaged in a "new" air coach service experiment which is of extraordinary significance, and which may possibly cause a readjustment in our thinking with respect to the prevailing concept of our national policy for civil air transport. This experiment needs to be carefully controlled and limited, if maximum benefits are to be derived in the form of sound conclusions for future action. But perhaps more importantly, there must be general appreciation of the scope of the problems involved and some awareness of the wider implications inherent in their solution.

To appraise the experiment objectively and to analyze the results as they become available, it is important that there should be some common understanding of (a) what air coach service *is,* (b) what the "experiment" consists of, (c) the nature of some of the problems to which answers are sought, and (d) the relationship of these problems to our present concept of national civil air transport policy. The discussion which follows will proceed under these general topics.

I. The Development of Air Coach Service[3]

The airplane has never been the most comfortable method of travel. The limitations of the airframe itself have never made it possible to

[3] The term "air coach service" has had various definitions, depending largely upon who was defining it. For example, an executive of an irregular air carrier might describe it as a new type of service originated by non-certificated carriers and designed for the poor man's purse, lacking various "frills" and contrasting with the "luxury" air service offered by the certificated lines. (See *Hearings before the Committee on Interstate and Foreign Commerce on* S. *Res.* 50, 81st Cong. 1st Sess. (1949) 260, et seq.) The executive of a certificated carrier might see it as merely "low-cost service at the lowest rates consistent with sound business principles." (*Ibid.*, 1126) The Analyses Division of the Civil Aeronautics Board some months ago defined it, in considerable detail, as "non-deluxe air transportation offered by certain of the air carriers, at a fare approximating 4 cents per passenger-mile as compared with the average of about 6 cents per passenger-mile for regular services, with departure times from the terminals generally between 10 or 11 o'clock at night and 3 o'clock in the morning, and eliminating the usual reservation procedures and meals featured by standard air service." (C.A.B. *Domestic Sky-Coach Survey,* April and May, 1949, p. 1.)

Actually, air coach service is hardly susceptible of firm definition in its present fluid state of development. There is no common understanding. For the purposes of this article, the various operations under discussion are self-defining.

offer the roominess of a good Pullman train, or the freedom of shipboard. At best, it is comparable to a high-class railroad coach in comfort. Moreover, it still remains a new and strange method of travel to most people.

During the early years of the Civil Aeronautics Act it was generally agreed by the operators that special personal services such as stewardesses, free meals, advance reservations, extra-comfortable seats, and limousine service to and from airports were necessary to help overcome the reluctance of the general public to fly, and during this period of general expansion and growth there were no significant pressures for the development of a more Spartan type of service at lower fares. Toward the end of World War II, however, the heavy traffic increases and large profits of the war period convinced the Civil Aeronautics Board and some of the carriers that standard passenger fares were unnecessarily high, and as a result there was a general reduction to a base fare of about 4½ cents per mile in 1945. Such a fare level rather effectively limited any experimentation with promotional tariffs during this period.

These fares, of course, turned out to be too low, in the light of rapidly rising operating costs, too-rapid expansion, and the failure of anticipated traffic increases to materialize. During the next two or three years the rates were gradually increased again until they reached their present level of about 6 cents a mile. During this period, however, most of the airlines were experiencing financial difficulties, and plagued with the problems of new equipment and new routes. It is only during the past year or so that some measure of stabilization developed.

Taking all of these matters into consideration, it appears that up until 1949 the certificated carriers have never been in a good position to experiment with promotional passenger fares, and that sound business judgment would have soon dictated the present air coach experimentation, even in the absence of outside influences. But it cannot fairly be doubted that at least the timing of the entry of certain of the certificated carriers into the air coach field has been greatly influenced by the operations of "non-scheduled" air carriers in the coast-to-coast long-haul passenger business, and on certain shorter-haul segments such as Chicago-New York, New York-Miami, and San Francisco-Los Angeles.

It has been estimated that during the year 1948 some ten percent of the passenger traffic between New York and the West Coast via Chicago or Kansas City was carried by non-certificated carriers. These carriers operated by virtue of a Civil Aeronautics Board exemption order which permitted the carriage of passengers on flights operated on a casual and infrequent basis. Regular and scheduled service was prohibited, but in view of the large number of carriers engaged in the business, the prospective traveler has in effect had a regular and con-

sistent transcontinental air coach service available for the past two years. The extent of some of these services is indicated by Exhibit 1.

Exhibit 1. — FLIGHTS BY PRINCIPAL IRREGULAR PASSENGER AIR CARRIERS BETWEEN SELECTED POINTS — YEAR ENDED JUNE 30, 1949

	Number of Flights	
Name of Carrier	*New York-Los Angeles*	*New York-Miami*
Air America	224	
Airborne Transport		60
Airline Transport Carriers	197	
American Air Transport & Flight School		331
Arrow Airways	215	
Associated Airways	49	
Coastal Airlines, N. J.		218
Miami Airline		150
Peninsular Air Transport		145
Robin Airlines	80	
Standard Air Lines	506	
Trans-American Airways	92	
Viking Airliners	359	
Total	1722	904

Source: C.A.B. Records.

These non-certificated carriers operated war surplus DC-3, C-46 and DC-4 aircraft with high density seating arrangements, eliminated hot meals in flight, advance reservations, and other luxuries, and offered the transcontinental passenger a saving of some $75.00, or 40 percent, on the cost of his journey. Naturally enough, such a saving proved attractive to a large number of "first time" air travelers, and travelers who for economic reasons might otherwise not fly, or even make the trip at all, and the business grew from the beginning. Under the peculiar conditions obtaining, including the fact that operations were only conducted between high-density traffic centers, with aircraft acquired as surplus equipment at a very low price, and with a minimum of the expense resulting from Civil Aeronautics Board regulations which the certificated carriers are required to bear, substantial profits were possible, and many individual operators entered the field.

In addition to the new business generated, the non-certificated carriers were, of course, taking away some of the passengers from the certificated lines, and this competitive situation soon became the subject of considerable concern to the transcontinental operators. The subject was variously discussed in the industry and with the Civil Aeronautics Board during 1948, and while the Board and the industry were generally agreed that conditions did not warrant any general reduction in the passenger fare level, the Board did encourage the study and consideration of various types of promotional services, including a very limited experiment in air coach service at lower fares.

Subsequently, late in 1948, Capital Airlines filed a tariff proposing the inauguration of coach type service between New York and Chicago

via Pittsburgh. While the stimulus for the entry of Capital into coach type operations came primarily from Capital's inability to compete effectively in the New York-Chicago market with its certificated competitors on its regular service, rather than from the effect of coach service competition by non-certificated carriers, it was the first filing of a domestic coach tariff by a certificated carrier.[4] Capital's plan deserves careful examination, since it set the standard for subsequent proposals to a considerable degree.

Capital proposed to inaugurate a new low-cost New York-Chicago service at a fare level of about 4 cents per passenger-mile, instead of the standard fare of about 6 cents. To justify this difference in rates, the flights were to be operated with 60-passenger DC-4 aircraft (a "high density" seating arrangement), with departures around midnight from each terminal, and with extra stewardesses and free meals in flight eliminated.

Capital also represented that because of the short-haul characteristics of its route system it had very poor utilization on its DC-4 aircraft, and that by scheduling additional flights at night it could obtain increased utilization which would in turn lower its overall operating expense level. Further, the service would be offered between the two greatest traffic centers in the country and thus would be operated under the most favorable conditions trafficwise.

The Board gave its temporary approval to the proposal, and service was inaugurated on a daily round-trip basis on November 4, 1948. As reflected by the Board's action, the initial conditions for approval of air coach proposals might be listed as follows:

(a) Operations must be conducted between pairs of cities having a very heavy flow of traffic;

(b) Equipment having high density seating arrangements must be used —that is, the equipment must have more than the average number of seats for that particular type of aircraft;

(c) Flights must be scheduled at off hours; and

(d) The cost of the service must be reduced by all possible small economy items, such as the elimination of meals, extra cabin attendants, advance reservation procedures, etc.

The second domestic air coach proposal which was to receive the Board's blessing was filed by TWA in December 1948, and its approval involved somewhat of a departure from the standards previously applied. TWA was operating two over-night local schedules between

[4] While this was the first purely domestic coach operation by a certificated carrier, Braniff had inaugurated a combination cargo-tourist flight in C-54 equipment to South America in June, 1948, and Pan American began coach flights between New York and San Juan in September of the same year, using 60-passenger DC-4 aircraft. Subsequently, Pan American added tourist flights to South America, and Northwest inaugurated coach service to Alaska. All of these services continue in operation. Discussion herein, however, will be confined to purely domestic operations.

Kansas City and Los Angeles with DC-3 equipment upon which its load factors were distressingly low. These light loads were attributed primarily to the particularly low level of rail fares in the area, and since the schedules were important from the standpoint of the postal service, the carrier requested authorization to convert them to coach flights in an effort to increase patronage. This would involve a fare reduction of approximately 35 percent below standard fares, and in order to justify this differential, reliance was placed upon those items of passenger inconvenience which had been considered important in the Capital Airlines coach proposal. In the case of TWA, however, these items were of much less significance. The flights to be replaced already were operated at night and during a period when meals would not normally be served, so that there would be no particular change in those aspects, and it was proposed to increase the seating capacity of the standard DC-3 aircraft previously used from 21 to only 24 seats, which could be accomplished with very little crowding. It should also be noted that the proposed operation was to be over a local route, with several intermediate stops, and between pairs of points of much lighter traffic density than the coach operation of Capital.

Since the Board felt that the competitive impact in the particular area would be very limited, it approved the proposal. It reasoned that there was a possibility that the lower fares would attract a large number of "new riders," and that any increase in the net revenues which TWA might be able to realize would benefit, since the flights were already being operated at a considerable loss.

Subsequently, TWA sought to extend its coach operation from Kansas City to Chicago and New York on the East, and from Los Angeles to San Francisco on the West. The Board withheld its permission since the proposal involved the use of DC-3s over a considerable portion of the service, and did not meet the test of high-density equipment previously laid down. However, TWA was permitted to inaugurate a New York-Pittsburgh-Chicago coach service using prewar Boeing 307s with 38 seats to enable it to hold its own with Capital in that market, where Capital's coach service was beginning to show rather impressive results.[5] The conditions attached were the same as those of Capital's operations, with the exception of the aircraft to be used. The Board approved the use of the Boeing equipment even though it did not strictly meet the high-density requirement. TWA's service over this route was inaugurated on May 31, 1949.

Meanwhile, on February 17, 1949, Continental had been permitted to inaugurate an over-night coach schedule at about 4 cents per mile between Kansas City and Denver, upon generally the same considerations which prompted the Board's approval of the TWA Kansas City-

[5] In March and April 1949, Capital expanded its coach service to include daily round trips between New York and Twin Cities, and between Washington and Chicago.

Los Angeles service. Continental had a lightly patronized over-night DC-3 flight between Kansas City and Denver already in operation which it desired to continue for the carriage of cargo, and it was represented to the Board that considerably lower fares would enable the carrier to attract enough passengers to the particular schedule to increase its net revenues.

Likewise, Mid-Continent was permitted to start a DC-3 coach service on March 1, 1949, over the non-competitive Minneapolis-Omaha-Kansas City route. This service did not prove successful, however, and was later abandoned by the carrier.

On March 24, 1949, Northwest was permitted to inaugurate the first transcontinental coach service by a certificated carrier between New York and Seattle. The service was operated with 55-seat combination DC-4s, which were arranged to permit the removal of seats for cargo as traffic demands required. Otherwise, the conditions of the service conformed generally to the pattern originally laid down for Capital's New York-Chicago operation.

In the meantime various other coach tariff proposals had been filed by other airlines, but were not permitted to become effective, either because (a) the fares were too low, (b) high-density equipment was not proposed to be used, or (c) the operation was not to be conducted between centers of sufficiently high traffic potential. All of such tariffs, however, proposed to reduce the costs of operation by eliminating meals, advance reservations, and other passenger service items.

Although the Board had announced earlier in 1949 that as a matter of policy it would not look with favor upon the reduction of general rate levels until a general downward trend in operating costs was apparent,[6] the filing of a number of these so-called coach service tariffs indicated that certain carriers in reality were seeking a general fare reduction. The Board, seeking to clarify its position with respect to coach fares and other types of promotional tariffs, issued a policy statement on September 7, 1949, which laid down guiding principles for the development of the coach service experiment.

The Board defined coach-type fares as being typically at a level of about 4 cents a mile, covering flights operated generally during off-peak periods and offering a standard of service less luxurious than normally

---

[6] "We will continue during the coming year to give careful consideration to tariffs filed by the carriers aimed at increasing their gross revenue. Unless, and until, a downward trend in airline operating costs is apparent, we feel that the general rate levels should not be adjusted downward. In this respect we except experimental and developmental service designed to operate at less than normal cost, and rates designed to secure new traffic. Currently, several promotional types of passenger service are the subject of experiment which the Board is following with close interest." CAB Economic Program for 1949, dated February 21, 1949.

provided. It specified the conditions which it considered to be necessary as a guide to the evaluation of coach proposals:

(a) That the operation be conducted over routes having a heavy flow of traffic;

(b) That high-density equipment (equipment having more than the average number of seats) be used;

(c) That the service be scheduled so as to minimize a diversion of traffic from regular flights; and

(d) That all non-essential service to the passengers be eliminated, such as meals, extra stewardesses, full reservation procedures, etc.

The Board also stated that on the basis of reported results to date there was considerable doubt that coach service could be conducted successfully with DC-3 aircraft having only 21 or 24 seats, due to the extremely high load factor necessary to cover operating costs at a 4-cent fare level. In line with this conclusion, the Board's approval was withdrawn from the Continental Kansas City-Denver operation, and the TWA service between Kansas City and Los Angeles. The latter service was permitted to be temporarily continued, however, pending the replacement of the DC-3s with DC-4 equipment, scheduled to take place within a few weeks.

Otherwise, the Board announced its intention to extend its approval of the existing DC-4 coach operations of Capital and Northwest, and the TWA Stratoliner service between Chicago and New York. It also granted approval of pending proposals of Northwest, between Chicago and Portland using 55-seat combination DC-4s, and of Western between San Diego and Seattle with 65-seat DC-4s. Disapproved were proposals of Capital for a New York-New Orleans service with 50-seat aircraft, and of National for a New York-Miami service with 46-seat equipment, both because of the failure to specify high-density equipment. The Board also denied a proposal of Northwest for coach operations between Chicago and Minneapolis for failure to limit the service to off-peak schedules.

This September 7 statement of the Board announced for the first time its general conclusions and policies relative to experimental air coach service, and, in effect, formally inaugurated what we have termed the air coach service "experiment." Up to that time the various individual operations were approved tentatively and hesitantly for successive periods of only a few weeks each, pending the reaching by the Board of some definite conclusions as to overall policy.

II. The Experiment Under Way

In announcing its intention to encourage broader experimentation in the air coach service field, the Board stated that a detailed economic justification for each tariff filing would be required, in order to prevent the indiscriminate extension of coach services and possible general

debasement of existing fare levels. Approvals were to be limited to an expiration date of June 30, 1950.

The Board's announcement was followed by a flurry of coach tariff filings by various carriers. Proposals which had failed of approval under the standards laid down, such as Capital's proposed New York-New Orleans service, and that of National between New York and Miami, were revised to fit the indicated requirements and refiled. Other carriers which had held off filing any proposals until crystallization of the Board's policy now submitted their plans. All of the new proposals were carefully tailored to fit the considerations outlined by the Board, and with one exception, to be discussed below, raised no new problems and were immediately approved. These new services included coach operations by Eastern between New York and Miami, New York and New Orleans, and Chicago and Miami; Delta between Chicago and Miami; National between New York and Miami; and Capital between New York and New Orleans. All of the foregoing operations involved the use of DC-4 aircraft with a seating arrangement of from 55 to 60 seats, and at a fare of about 4 cents per mile.

In one area, however, new service was proposed upon a basis which presented new policy problems to the Board, and which contained implications of considerably more significance than the proposals previously approved. Both American and TWA submitted plans for through coach operations over the principal transcontinental route — New York-Chicago-Los Angeles. TWA's proposal contemplated the use of 60-seat DC-4 equipment, and was otherwise in accord with the principles established by the Board. American, however, submitted plans which varied in certain important respects from all other coach proposals. Although the Board approved both tariffs, the unique features of American's contemplated service lent a new and different aspect to the possible effect of coach operations upon the air transport system as a whole.

American proposed the operation of air coach flights between New York, Chicago and Los Angeles, which are of course points of the highest traffic density, eliminating food service and advance reservations. But American opposed *any restrictions upon flight departure* times on the basis that transcontinental operations extend around-the-clock, and operations only during off-peak periods are impossible. More importantly, it proposed to operate with DC-4 aircraft only *until such time as the conversion of three DC-6s with 70 seats each could be completed.* The service was to be conducted thereafter with the latter planes, which are among the finest commercial aircraft in existence. And in order to justify the conversion expense, American asked that its tariff be approved until December 31, 1950, rather than to June 30, the date previously fixed by the Board for the termination of all experimental coach tariffs.

American submitted a carefully reasoned economic justification for its proposed service, which will be subjected to more careful scrutiny below. The striking feature about the proposal, however, with respect to its economic basis, is that by constructing the coach fares on a base rate of 4.47 cents per passenger mile, and at the same time increasing the seating arrangement of its DC-6s from 52 to 70 seats, the increase in seating capacity is in exactly the same ratio as the difference between the coach fares and the standard rate basis of 6 cents per mile. This means, assuming the same costs, that American will approximate the same net return at the same load factors from coach flights as from regular flights, thus making the problem of diversion from its own regular services relatively unimportant. In theory, at least, the proposal is economically sound from American's own standpoint.

Thus, only a few months after reaching what were thought to be firm conclusions concerning the limitations under which experimental coach service would be required to be operated, changed conditions dictated important modifications of the experiment in various respects.

The Board seems now to have of necessity (a) abandoned the off-peak scheduling requirement, at least for transcontinental operations; (b) tacitly agreed to an extension of all coach operations until at least December 31, 1950; and (c) most importantly, relaxed the requirement of less comfortable, less speedy, non-luxury equipment. Figures demonstrate that the DC-6 with 70 seats has as much space per passenger as a DC-4 with 52.5 seats, or considerably more than the 55 and 59-seat DC-4s used by the other carriers in coach service. With its higher speed and comparable roominess, a 70-seat DC-6 is certainly at least equal in luxury to standard DC-4 service, and much superior to DC-4 air coach operations.

It will be immediately appreciated that American's proposal, if sound from a cost standpoint, promises far more significant results than the previously-approved coach service designed to offer a *supplementary* low-cost service at off hours in obsolete equipment, relying upon passenger inconvenience and discomfort to justify the fare differential below standard rates.

So to summarize, the experiment as of January, 1950, consists of the following domestic air coach operations:

American	New York-Chicago-Los Angeles.
Capital	New York-New Orleans, via Pittsburgh; New York-Twin Cities, via Pittsburgh, Cleveland, Detroit and Milwaukee with a connection at Pittsburgh for Washington; New York-Chicago, via Pittsburgh; Washington-Chicago, via Cleveland and Detroit.
Delta	Chicago-Miami, non-stop.

Eastern	Chicago-Miami, non-stop; New York-Miami, non-stop; New York-New Orleans, via Washington, Atlanta, Birmingham and Mobile.
National	New York-Miami, non-stop.
Northwest	New York-Seattle, via Detroit, Milwaukee, Twin Cities, Billings and Spokane; Chicago-Portland, via Twin Cities, Billings and Spokane.
TWA	New York-Chicago, via Pittsburgh; New York-Los Angeles, via Chicago and Kansas City; Kansas City-Los Angeles, via Wichita, Amarillo, Albuquerque and Phoenix.
Western	Los Angeles-Seattle, via San Francisco and Portland.

With the exception of TWA's services, all of the foregoing are single daily round-trip schedules, operated at night, using DC-4 equipment with seating arrangements ranging from 55 to 73 seats. The TWA operation between Kansas City and Los Angeles consists of two over-night round-trip schedules using DC-3 equipment (soon to be replaced with DC-4s), and the New York-Chicago service is a single over-night round-trip using Boeing Stratoliners. The New York-Los Angeles service, also an over-night operation, is flown with DC-4 70-passenger aircraft.

As previously pointed out, American intends to replace its DC-4 equipment with 70-passenger DC-6's as soon as possible, and this move may foreshadow other changes in the situation in the fairly near future. United may decide to enter the field in competition with American, in order to protect its transcontinental position, and TWA may also possibly find it advisable to use Constellations over the route for the same reason.

III. Some of the Problems

As has been pointed out, some of the certificated carriers have been conducting domestic air coach operations on a limited basis for about a year, and the results from these various operations are already available. The nature of the service has been such, however, that the experiment has not proven very much as yet. The operations have been too limited in scope to provide very significant answers.

Possibly one thing that has been proven is that aircraft of limited size and speed and relatively high cost, such as the DC-3, cannot be successfully operated in coach service. Actually, however, it took no experimental operation to prove this, and the Board only permitted air coach services with DC-3 equipment under certain limited special conditions. Nor did it take any experiment to prove that more people will travel by air if the fares are reduced 40 percent, even though the sacrifice of some degree of comfort is necessary. The extent of the

demand has been impressive, however. The operations of the "non-skeds" and the coach services of the certificated airlines have again demonstrated the correctness of the theory Ludington Lines advanced in 1930 — low-enough fares will offset the reluctance to use a novel and somewhat more hazardous form of travel in the minds of a large number of people.

Capital Airlines has demonstrated that operating between two of the best traffic centers in the world, over a medium-haul segment requiring only 4½ to 5 hours for the journey, and with very limited competition from other certificated carriers, it can show a profit. This is certainly true on an out-of-pocket cost basis, and on a fully-allocated expense basis the operation has probably been no worse than marginal. It would appear, based upon fairly arbitrary cost allocations and certain untested assumptions, that on a fully-allocated expense basis, the break-even load on a DC-4 at a 4-cent fare is about 41 passengers, taking into effect the estimated diversion from the carrier's regular services. Capital's loads have held up within a fairly reasonable range of that figure. Similarly, it would seem that on this basis Northwest's New York-Seattle coach operation has likewise been profitable to the carrier.

But because of the comparatively short period and restricted scope of air coach experience, little significance can be given to the results to date. The answers to the vital questions which must be resolved can be derived only from continued carefully-controlled experimentation and study. Nothing could be more damaging to the financial welfare of the industry than indiscriminate extensions of coach operations without regard to their effect on the financial position of the industry.

It has been and will continue to be difficult for the Board to resist the pressures which will inevitably develop for hasty expansion of the services before there has been time to evaluate results from a long-range standpoint. The price appeal of the service is compelling. The public always is enthusiastic about buying something at an unexpectedly low price, be it shoes or a trip to California. But if not carefully controlled, coach operations might lead to a costly price war which could destroy the financial soundness of the entire domestic air transport system.

The Board is also faced with a related problem. It must decide whether the public interest requires the entry of presently uncertificated carriers into the field to provide *specialized* coach services. This question is the subject of a formal proceeding presently in progress before the Board,[7] and can be answered only after the development of a complete record in the case. In our discussion herein, however, we are concerned only with the problems stemming from presently certificated operations, and will leave aside for the present the question of

[7] *Transcontinental Coach Type Service*, Docket No. 3397, *et al.*

which carriers, if any, will ultimately be found to be required to operate the service.

Only preliminary conclusions can be drawn from air coach experience to date, leaving these various major questions almost wholly unanswered:

1. *Size of the potential market?*

Air coach service in its basic aspect represents, or should represent, an effort to accomplish a major expansion of the air travel market by penetrating the lower-income-bracket potential. While it is true that the response to such coach service as has been operated during the past few months indicates a considerable demand, the restricted scale of such operations furnishes little basis for estimating the true size of this potential.

In terms of the 1940 dollar, air transportation is cheaper today than it was before the war, which is in effect an indirect lowering of price. In 1940 the airlines received 5.26 cents of passenger revenue per passenger mile, while in 1948 they received 5.75 cents, or an increase of about 9 percent. In comparison, the wholesale price index rose 109.8 percent during the same period, the retail price index 91.6 percent and *rail fares 32.5 percent.* This indirect lowering of price, however, has not as yet resulted in any general penetration of the mass travel market. Air travel has maintained a fairly reasonable rate of steady growth, but there are signs that a ceiling may have been reached beyond which increases at the present standard fare levels may be very slow. The increase in passenger travel for the year 1948 was very slight, and for 1949 will apparently amount to between 10 and 15 percent, a considerable part of which may be attributable to the various promotional fare plans which the carriers successfully operated during the year.

It thus appears that even though airline fares have been lowered, compared with rail fares and prices generally, the penetration of the mass travel market has not been great and may have reached a ceiling at present standard fare levels. There is, of course, no certainty that a further reduction will so greatly increase the number of air travelers as to supply the heavy loads necessary for high-density coach type operations, and this is one of the questions upon which the present air coach experiment may throw some light.

2. *Effect of competition?*

The size of the market will also shape the pattern of competition in air coach services. It may be expected that if one carrier has been authorized for air coach service over a route it will be difficult to deny similar opportunities to its competitors. And over most of the heavy

traffic routes there are at least two and in some cases four airlines operating in direct duplication of each other. This means that although the coach traffic potential may be great enough to support flights by one carrier between two traffic centers, it may not be sufficient to support coach service by all the competitors operating over the same route. It may result in reducing the load factors of all of the coach flights to below the break-even point for all of the competing carriers.

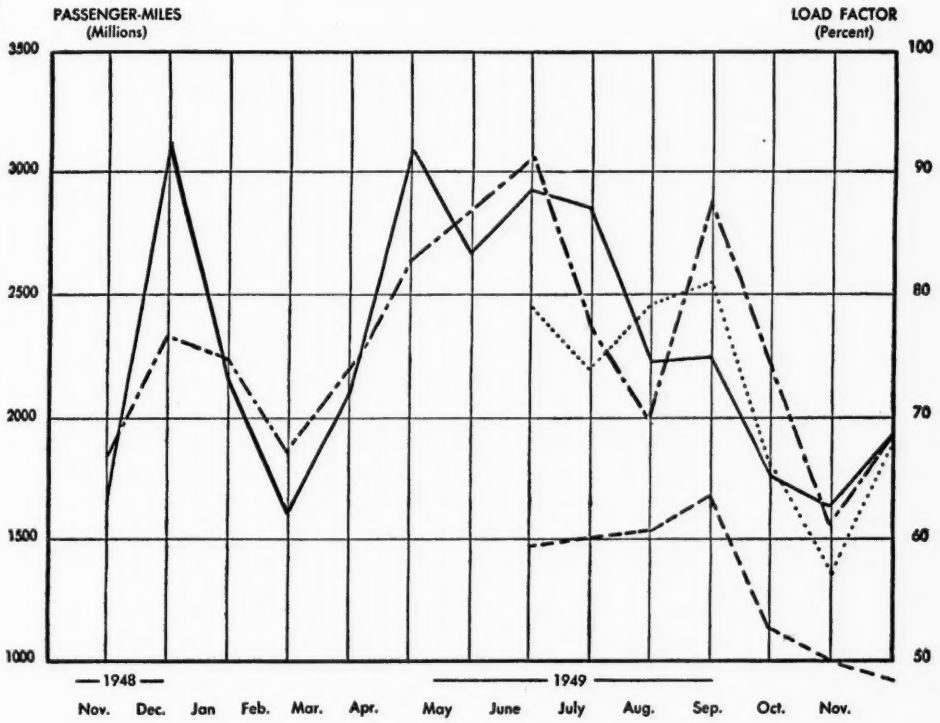
The coach operation of Capital between Chicago and New York is a good example. Capital started this service in November 1948, and had the field to itself for several months, until TWA began its Stratoliner schedules over the same route. TWA used equipment with about the same appeal as Capital's 59-passenger DC-4s and apparently was able to achieve about the same load factors as Capital had been experiencing. Capital's loads continued to hold up fairly well after the inauguration of TWA's service, and it might be concluded that in this particular situation there was enough air coach business for both carriers. See Exhibit 2.

Very soon, however, the situation will change. Instead of being faced with a TWA operation in 38-seat Boeing 307s, and nothing more, Capital is going to be operating its service in competition with American's 70-passenger DC-6s and TWA's DC-4s, both flying New York-Chicago non-stop as against Capital's one or two-stop service. Competition will probably compel United to establish a competitive service using DC-6 equipment, and TWA will probably switch to Constellation aircraft.

Actually, under *present* limitations the competition should not be destructive, since both TWA and American are limited to one transcontinental schedule daily, presently departing New York and Chicago at off-hours. These schedules will offer a limited number of local Chicago-New York seats, and in view of the very heavy traffic flow between these cities it seems very likely that there will continue to be enough business for all three carriers. On a permanent basis, however, the situation could be very different. If American were to continue its DC-6 operation, and TWA enter the market with Constellations, and United with DC-6s, all operating Chicago-New York non-stop at various hours of the day, and without limitations on schedules, Capital would find it very difficult to compete, and the coach services and regular services of the other competitors might show diminishing returns on an overall basis.

Likewise, assuming the eventuality of two standards of service, competition may not only compel competing coach services to offer similar type of aircraft and similar speeds and schedules between various pairs of cities, but may also compel competition within the carrier itself. The so-called luxury service would tend to become more

Exhibit 2—CERTIFICATED COACH OPERATIONS BETWEEN NEW YORK AND CHICAGO THROUGH DECEMBER, 1949.



Source: Carrier reports to C.A.B.

luxurious, and the so-called coach service would tend to become less Spartan. The costs of these promotional efforts might become a very serious danger in an industry where an already thin profit margin may become even thinner.

3. *The area of operation?*

It seems to be an accepted postulate that air coach service may only be operated at a profit over heavy traffic routes between large cities,

and the Board, so far, has generally limited the experiment to such routes.

Cost figures for coach operations are as yet very sketchy, and at best are only assumptions. But some limited analysis has been made, and as stated previously, it would appear that loads of approximately 41 passengers are necessary to provide break-even revenues for a DC-4 coach service on a fare basis of 4 cents per mile. This is on a fully-allocated cost basis. It takes into consideration assumed diversion from regular services of 30.7 percent of the coach passengers, an estimated average derived from the Board's Sky-Coach Survey (May, 1949). This means that to support *one daily round-trip coach schedule,* a given pair of stations should, in theory, develop an average of 82 coach passengers per day, which is *more passenger traffic than is produced presently by almost three-fourths of our domestic airline cities.*[8]

These figures are, of course, purely theoretical and based upon untested assumptions. But the fact remains that if the economic feasibility of air coach operations depends upon the maintenance of high average passenger loads and load factors, as presently appears to be true, then the area of possible operation of such service is going to be limited to a relatively few airline stations. See Exhibit 3. This situation may give rise to charges of discrimination against the smaller cities which will not have low-fare service available, as well as related problems of readjustments in basic fares and services.

Exhibit 3. — CONCENTRATION OF PASSENGER REVENUE — TOTAL DOMESTIC AND TERRITORIAL TRAFFIC TICKETED TO AND FROM INDIVIDUAL STATIONS — SEPTEMBER 1948

Station	*Cumulative Percent of Total Stations*	*Cumulative Percentage Passengers*	*Passenger-Miles*
New York/Newark	0.2	13.7	15.3
Chicago	0.5	19.9	22.7
Boston	0.7	24.2	25.6
Los Angeles	1.0	28.4	33.3
Washington	1.2	32.4	37.2
San Francisco/Oakland	1.4	36.0	43.2
Detroit	1.7	39.0	45.7
Cleveland	1.9	41.0	47.2
Pittsburgh	2.2	43.0	48.6
Seattle	2.4	44.7	51.0

Source: C.A.B. Airline Traffic Survey, September, 1948.

For example, John Doe of Peoria, Illinois, must pay $106 for his ticket to Los Angeles. Richard Roe, of Chicago, need only pay $85 for his *air coach ticket* to the same city. Moreover, John Doe will probably ride in a slow, two-engine airplane, taking 12 hours for the trip, while his fortunate Chicago cousin may ride nonstop in a relatively com-

[8] Based upon the Civil Aeronautics Board traffic survey for September, 1948.

fortable DC-6 in approximately 9 hours. Since most of the airlines receive government financial assistance, taxpayer John Doe of Peoria, Illinois, will in all probability demand coach-type service as a matter of right.

How much would it cost to offer coach-type service over all or most of our air transport system is a matter for conjecture, but even allowing for a proportionate increase in traffic for the smaller cities, the expense might well be enormous. For example, one major carrier estimates it will cost in excess of $250 in direct flying costs alone to serve one intermediate stop only 50 miles off its direct nonstop coach route on a single round-trip schedule. Another carrier estimates that serving 38 of its smaller cities (out of a total of 68 cities) now costs it approximately 3 to 4 million dollars a year at standard rates.

4. *Equipment?*

Variations in cost characteristics and flexibility of seating arrangements would appear to be limiting factors in the choice of equipment for economically sound air coach operations. The aircraft best suited for such service is obviously one in which a greater number of people may be carried with a consequent reduction in the cost per seat mile. Further, since available data indicates that coach traffic is more sensitive to daily and seasonal variations than regular travel, the aircraft should not only be large enough to offer the greatest possible margin of protection against the thin spread between costs and revenues inherent in low-cost mass travel, but also to provide enough capacity to make it possible to off-set periods of light movement with high-peak loads.

Air coach proposals have been presented to the Board by certain of the carriers which contemplated the use of DC-4 equipment with as few as 44 seats, although none has been permitted to operate with less than 55 seats. If, as pointed out above, an average load of 41 passengers is necessary to break-even with DC-4 equipment on coach operations, it would appear to be impossible to attain satisfactory average loads with aircraft of less than 55 seats.[9] A number of carriers are using 70-seat DC-4 arrangements, and one operates with 73 seats. The results of the various operations must be carefully studied to determine the most effective seating density for economically sound service.

The plans of American Airlines also will raise the problem of the use of the newer-type planes, such as the DC-6, Constellation, Stratocruiser, etc., for air coach operations. The unit costs of such equipment are generally low in comparison with the older models of aircraft, and if converted to high-density seating arrangements similar to

[9] The operation of 55-seat equipment may also raise competitive problems in some areas from a diversionary standpoint. For example, Eastern operates DC-4s in regular service with a 56-seat arrangement, and certainly a 55-seat coach operation in the same area would be very effective competition for the regular operation.

the 70-seat interior planned by American, would show particularly low costs on a seat-mile basis. For this reason such equipment would appear to be, from a purely economic point of view, better adapted to coach operations than the DC-4. On the other hand, the DC-6 represents one of the finest aircraft the airlines have to offer, and is the basis for the present standard service of several of the major airlines. The widespread use of such aircraft by American for coach flights might eventually force the use of similar equipment in coach service by all competitive carriers, the elimination of older, slower equipment such as the DC-4, and a sharp curtailment or the discontinuance of present regular-fare operations between major traffic centers. The competing airline which is not financially able to obtain comparable equipment may not only be forced out of the air coach business, but out of the airline business itself.

5. *Costs and fare levels?*

For the most part, coach fare levels have been stabilized at about four cents per passenger mile. This rate has apparently been the result of several factors, including in addition to cost considerations, the effect of the coach services operated by the non-certificated carriers, and the level of competitive rail fares. Obviously the ability of air coach service to broaden the air travel market depends to a considerable degree upon the relationship of the price to rail coach fares.[10] On the other hand, the amount of diversion from regular fare air service will depend largely upon the fare differential between the two types of air service. It would appear that the four-cent level is probably the lowest point at which air coach fares can be established at this time.[11]

As has been shown, even at this level very high average loads are necessary to support an economically sound operation. It may be that somewhat higher fares will be more desirable. American Airlines has established its transcontinental coach fares on the basis of approximately 4.5 cents per mile, and the results of its operations at that level will be enlightening.

The ultimate airline fare structure must be so designed as to bring in a maximum volume of traffic on a basis which will produce revenues sufficient to yield a reasonable profit to any efficiently operated airline over all its system, and not just a few dense traffic routes. There will be a tendency toward distortion of the costs of air coach service insofar as the present experiment is concerned, because since only a single schedule is being added in most instances, indirect costs will not be measur-

[10] Railroad coach fares presently range from 3.4 cents per mile in the East to 2.5 cents per mile in the southern and western states. However, the mileage between stations is often shorter by air. For example, Capital Airlines' coach fare from New York to Chicago is $29.60, and the Pennsylvania Railroad charges $30.71. But American Airlines charges $85.00 coach fare from Chicago to Los Angeles, while the Santa Fe's "El Capitan," a fast coach train, only costs $53.79.

[11] A 4-cent fare is equivalent to about a 2.4-cent fare in terms of the 1939 dollar. This is below the lowest rates suggested by low fare advocates in the past.

ably increased. Thus an airline may claim that the added service is relatively inexpensive because it uses aircraft otherwise idle and the indirect costs are absorbed by the other services. This is the "added cost" theory, of course, and should not be allowed to confuse our thinking on a long-range basis. In the long run, air coach service, if successful, will be a major part of airline operations, and future planning will need to take it fully into account on a completely allocated cost basis.

The fare level is also most important from the standpoint of diversion. The primary object of a special low-fare service is to attract additional traffic at the low fare level, without losing the market presently being served. To the extent that air coach operations divert from regular fare services, this effect is lost. The reduction in costs which makes lower fares possible in air coach service is almost entirely the result of increased loads in high-density equipment. The direct savings due to the elimination of meals and other items of reduced service are relatively minor in total. American, for example, estimates that such savings would justify less than a 5 percent reduction in standard fares, and in the case of its coach operation will be entirely off-set by the additional direct cost of handling increased passenger loads.

But the drive for high load factors in high-density equipment, particularly in fast modern aircraft such as the DC-6 and Constellation, is almost certain to involve a considerable amount of diversion from regular fare services. If so, it may mean that by diverting a high proportion of the carriers' long-haul business (coach operations must of necessity be conducted over fairly long-haul segments) the more profitable portion of the regular business would be eliminated, without any proportional increase in net revenues. The overall system net revenues might thus be reduced, even though the promotional coach service were successful, since the bulk of the carriers' profitable long-haul low-cost service would be performed at a lowered rate, without a corresponding increase in the standard rates for the high-cost traffic between smaller points, the losses on which are presently offset by a profit from the low-cost heavy traffic between major points.

6. *The kind of air transport system which may evolve?*

But even assuming that coach service develops to be economically sound in and of itself, broader questions as to the place of air coach transportation in our air transport system and the effect on that system will still remain. For example, as has been pointed out, American's proposed use of DC-6 equipment in itself promises to pose difficult questions of policy. The proposed fare of $110 between New York and Los Angeles represents a saving of $47.85 under the standard rate. For the lower fare the passenger will fly in the same equipment at the same elapsed time, but will be slightly inconvenienced as to seating accommodations and will receive no meals. Such a slight difference in service as compared to the substantial savings involved will probably

create a heavy diversionary effect. Competitive pressures may very well cause United also to inaugurate DC-6 coach service between the same points, and TWA to substitute Constellation aircraft for its present DC-4s. This would result in three daily transcontinental coach flights with the most modern equipment and undoubtedly would attract heavy loads. Such operations could show very impressive results at the end of the experimental period.

The Board will then be faced with deciding whether to authorize the service on a permanent basis with the realization that if it does so more schedules will be added and the net result will probably be the substitution of a 4½-cent air coach operation between New York and Los Angeles for the present 6-cent fare structure. The same problem will exist in other areas of successful air coach experimentation, and upon the Board's decision will depend in large measure the future service pattern of the industry. If a lowered fare structure is to be established between the major cities, then some decision will have to be made as to whether the national interest will require its extension to other and smaller airline stations, with resulting losses to be made up through the mail pay provisions of the Civil Aeronautics Act. Unless we are eventually to destroy the traditional single-level fare structure and relate fares more closely to a cost of service basis, so that the more costly services over the segments of low traffic density will pay higher fares, then consideration must be given to abandoning the hope of future self-sufficiency and accepting the burden of supporting the low-fare service in high-cost areas with Government funds — the thin profit margin produced by fares at a 4 or 4½-cent level will provide little support for coach service on segments which are not self-supporting in themselves.

As has been demonstrated, the air coach service now being tested by the Board and the industry is not merely an experiment in fares. It goes to the very heart of our future national policy for civil aviation and the shape and extent of the air transport system to be developed thereunder.

After many years of almost continual hearings, investigations and reports by official committees and boards, studies by various executive agencies, and decisions of the Civil Aeronautics Board, our civil air transport policy is still unsettled. Within the recent past we have had official expressions of varying concepts of national policy from three sources, and the current industry investigation being carried on by the Senate Interstate and Foreign Commerce Committee under Senator Edwin C. Johnson may well result in still another and different approach. The President's Air Policy Commission concluded that our national interest would be best served by a civil air transport system operated as a public utility under Federal regulation, with continued financial assistance from the Government until self-sufficiency can be

achieved.[12] The Congressional Aviation Policy Board would retain the same form, but with the civil system fitting into a single defense pattern with the military air arms, ideally self-sufficient but subsidized if militarily necessary, to the extent required within the budgetary limits of our economy.[13] And the Secretary of Commerce has recommended that air transport operations be made purely competitive, with Government monetary assistance and restrictions upon entry into the field (certificates of convenience and necessity) entirely eliminated, except where essential for national defense purposes.[14]

It is obvious that the major problems presented by the air coach experiment must be considered in the light of such varying concepts of national policy, and the type of air transport system to be encouraged and developed under the policy finally settled upon. The results of the experiment may have a pronounced effect upon the shaping of that policy.

(To be continued)

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[12] SURVIVAL IN THE AIR AGE, January 1, 1948.

[13] *National Aviation Policy*, Rep. No. 949, 80th Cong., 2nd Session, March 1, 1948.

[14] *Issues Involved in a Unified and Coordinated Federal Program for Transportation*, U.S. Department of Commerce, December 1, 1949.

THE STAKE OF THE SCHEDULED AIRLINES IN SOUND AIRPORT DEVELOPMENT

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FOR the better part of two decades scheduled airlines and airport operators from coast to coast have been slugging it out over the conference table to reach agreement on rates, charges and rights at existing or contemplated airport facilities. Out of these agreements has developed a national structure of rates, charges and rights at airline airports which is generally considered to reflect the desires of the scheduled airlines.[1] At least it can be said that at most of the nation's major air traffic centers, airline-airport agreements have been executed which incorporated substantially the arrangements desired at the time by the representatives of the scheduled airlines.

With this background, one might reasonably expect to find in the United States today a system of airline airports which would be able to contribute in full measure to the maximum development of commercial air traffic, and the accommodation of that traffic by scheduled airlines at minimum expense. Unfortunately, the nation's present airline airport system falls far short of meeting this test. For example,

1—LAGUARDIA at New York, which handles more scheduled air passengers than any other airport, has outmoded terminal facilities which require costly duplicate installations by the scheduled airlines and the processing of the bulk of airline passengers through temporary facilities remote from restaurants, bars, and other revenue-producing concessions.

2—CHICAGO, the nation's second largest airline stop, is struggling with almost impossible congestion at its present airport. In seeking to concentrate all scheduled airline business for the entire Chicago region at its new O'Hare Airport, it may well be further hurting the scheduled airlines by putting an impossible barrier of ground time in the way of traffic which otherwise would move by air.

3—WASHINGTON, the country's third largest center for scheduled air passengers, has recently been much in the news because of its congested air space which is aggravated by the proximity of two military air bases.

4—DETROIT, potentially one of the nation's top airline markets, is increasingly handicapped by having its airline airport 31 miles

[1] CHARLES S. RHYNE, AIRPORT LEASE AND CONCESSION AGREEMENTS.

from the center of the city, and even further from some of its major air traffic centers.

5—BOSTON, with a heavy State investment in Logan International Airport, still lacks a permanent central terminal building and faces the prospect of activating its new Apron Building without the facilities for developing concession revenues and other ancillary income which should be available from its heavy airline traffic.

Cleveland, Newark, St. Louis, Houston, Cincinnati, Kansas City and Philadelphia are others among the nation's larger air centers which are facing major problems of airport development, — and there are many more. Hardly a day passes which does not see an airport operator somewhere in the country making decisions which will have their reflection in the future profit and loss statements of the scheduled airlines.

It must be emphasized that these are not rate decisions, but much more basic decisions as to airport location, layout and design, facilities, and operating procedures. These are the decisions which determine in the long run:

1—How much traffic the scheduled airlines can develop at the airport.

2—How economically that traffic can be handled.

3—How much ancillary revenue can be developed to reduce the burden of terminal charges on the scheduled carriers.

And these are also the decisions which emphasize the community of interest between airport operators and the scheduled airlines. Forty acres and a mule may make a farm, but 500 acres and an airplane are a long way from being an airport. Without adequate airport facilities, the airline is helpless to develop its full traffic potential or handle its traffic economically. Without effective development of the air traffic, the continued operation and development of adequate airport facilities cannot be justified. The functions of the airport operator and the scheduled airline are completely complementary. Here are two parties who certainly ought to be scratching each other's backs, not scratching each other's eyes out.

There isn't much question that by and large the airport operators appreciate their stake in sound airline development. Generous incentive leases in city after city have resulted in the absorption of continuous deficits by airport operators to provide facilities for scheduled airlines at a price which the airlines felt they could afford to pay. But this preoccupation with price on the part of the airlines, to the exclusion of the *quality* of the facilities, has produced a system of airline airports which falls woefully short of meeting present and prospective airline needs.

Stake Greater Than Price

It is time to appreciate that the stake of the scheduled airlines in sound airport development is far greater than merely the price paid for the use of the facilities or the rights which can be negotiated as part of

that price. Suppose, for example, that the scheduled airlines, as the result of their airport negotiations, were paying one-third less today for the use of airport facilities than they would otherwise have to pay. Through concentration on the price phase of their stake in airport development, they enjoy, therefore, an annual saving of probably no more than $2 million.

Against that, however, they have a system of airline airports which is not conducive to full development of air traffic in many communities; which is seldom geared to economical airline operation; and which is often lacking in facilities for the development of ancillary revenues. Let's see what concentration on some of these factors might mean to the airlines in dollars and cents:

1 — An annual increase in revenue passenger miles of only ½ of 1% as the result of improvements in airport location, access highways, ground transportation arrangements, and in-town terminals would mean, at current volume, increased annual airline passenger revenues of about.....$2,000,000

2 — At present ratios between freight and passenger revenues, this would mean increased annual freight revenue of about.....$ 200,000

3 — An average saving of only 50¢ per scheduled aircraft movement from improvement in airport layout to reduce taxiing distances between runways, terminals and hangar areas would mean, at current volumes, an annual saving of about.....$1,800,000

4 — Most terminal buildings and the adjacent ramp area have not been designed for economical airline operation. The handling of passengers' baggage and mail and the costs of spotting and servicing aircraft on the ramp are usually higher than they would need to be with efficient terminal ramp design. If, through cooperative effort, the airlines could save only ½ of 1% of their ground costs, they would enjoy an additional annual saving of about.....$1,000,000

5 — The development of additional net concession revenue to the airports of only 5¢ per airline passenger per year from improvements in terminal design and passenger handling procedures would mean additional annual airport revenue not required from the scheduled airlines of about.....$1,500,000

These few examples illustrate the fact that the scheduled airlines have a much greater stake in sound airport development than merely the price tag which goes on the finished product. Airlines and airports together have far more to gain in dollars and cents by working together

to expand air traffic and airport revenue and to reduce airline operating costs than they can save or gain by placing their primary emphasis on rates and charges. To paraphrase the slogan of a popular radio program, "It's cooperation, — three to one."

The typical pattern of airline-airport cooperation in the United States has been to delegate discussions of airport location, layout and design, facilities, and operating procedures to so-called "Technical Committees" of airline personnel. In general there is no question but that these Committees have done a constructive, worthwhile job in working with airport operators. But their primary function has not been to relate location, design and layout, facilities, and operating procedures to the broad policy problems which confront airports and airlines alike, — that is to the questions of expanding air traffic, reducing air carrier costs and expanding non-flight revenue.

When the negotiations have reached the level of the so-called "Top Committees," where policy might appropriately be considered, the emphasis is usually shifted to a concerted drive by the airport operator to get rates as high as possible and a concerted effort by the airline representatives to get rates as low as possible, neither group having too much regard either for what is a fair rate for the facilities and services offered or whether those facilities will really be suitable for full development of air traffic, economical air carrier operation and efficient exploitation of ancillary revenues.

The real future of air transportation lies on the ground. In the past eight years, the flying costs per available ton-mile of the domestic scheduled airlines have remained almost unchanged, — while ground and indirect expenses have increased about 20 percent. In September, 1949, there were 693 communities in the United States certificated for scheduled air service, of which 254 were not being served, many because of the lack of adequate airport facilities. You can fly from Los Angeles to New York at 6¢ per passenger mile, but when you get on the ground at LaGuardia Airport, you will pay 13.5¢ per mile to ride the airport limousine to mid-town Manhattan. A 100-pound shipment of air freight from New York to Chicago will cost only $8.80 for the line-haul transportation, but pick-up in New York and delivery in Chicago will add 27%, or another $2.35.

The location of airports, the economy and efficiency of ground transportation of air passengers and cargo, the economy and efficiency of airport installations and operating procedures, and the ability of airport facilities to produce ancillary revenue are the keys to expanded air traffic, reductions in costs of operation for scheduled airlines, and the absorption of a greater portion of airport costs by non-airline revenues. Airport operators throughout the country are being called upon every day to make decisions on these problems which are of vital consequence to the scheduled airlines. Unfortunately many such decisions are being made without the cooperation of the scheduled airlines, per-

haps because of their traditional preoccupation with the price tag on airport facilities and services, or perhaps because they fail to appreciate the importance to their industry of sound airport development and operation. In either event, it will be worthwhile to discuss the effect of some of these decisions on the volume of traffic and economy of operation of the scheduled airlines.

Location of New Airports

Between 15 and 20 of the country's major air traffic centers will outgrow their present airport facilities in the next five years. In many cases the existing airport does not lend itself to expansion and new airport sites will have to be selected and developed. With limited municipal borrowing power, the cheapest site is usually the most attractive. But the cheapest site is usually the most distant from the center of the city and therefore the least productive of air traffic. Cooperation in airport location studies at major air centers can pay the scheduled airlines handsome profits through the increased traffic which can be generated at good airport locations. It will be good business to pay higher rates for a close-in airport which will generate maximum air traffic, rather than to seek a bargain-counter airport which usually is not a good traffic generator.

Runway Length and Strength at Existing and New Airports

The larger and heavier aircraft now in use and in prospect mean lower line-haul costs per seat-mile and per available ton-mile, but they mean heavier costs to the airport operator in terms of more expensive runway, taxiway, and apron construction and higher maintenance charges. Obviously such improved aircraft cannot be of maximum benefit to the airlines unless airports are available which will permit their use without crippling restrictions on payload such as now exist at a good many airports.

To get such airports, however, costs money. At existing airports, the airport operator finds little inducement to strengthen or lengthen the runways to accommodate new aircraft since his flight fees are usually fixed under long-term leases. Any additional capital investment under such inflexible arrangements simply means a greater deficit for the airport. Where new airports are under consideration, it is easy to build the type of runways which will best serve the scheduled air carriers *if* the carriers will agree on the kind of runways they want, and *if* they will avoid trying to price their use of the airport so low that the desired runways are impossible to finance. That is the real nub of the problem.

In this connection, it is worthwhile to remember that if restrictions at a particular airport reduce the payload of only one scheduled flight per day by 1000 pounds, it will mean a loss to the carrier at an average haul of only 200 miles of about 75,000 available ton-miles per year.

At 60% potential load factor and 40¢ per ton-mile average revenue, this means a revenue loss to the carrier from one scheduled flight per day of $18,000 per year, or about $50 per departure. Pricing problems at airports are of minor significance compared to stakes of this magnitude which can be gained through sound airport development.

Aerial Approaches to Existing and New Airports

The advent of larger and heavier aircraft and the concurrent development of improved instrument landing devices and procedures have resulted at many airports in serious problems with respect to the marking or removal of obstructions to aerial navigation in the vicinity of the airport. An airport designed or planned for operation with 40 to 1 approach protection under conditions of 500 foot ceilings and 1 mile visibility, faces a very substantial capital outlay to provide 50 to 1 approach protection and provision for operation under conditions of 200 foot ceilings and ¼ mile visibility. But scheduled airlines cannot develop their full traffic potential unless they can achieve greater schedule reliability than has been possible in the past. The CAA program for the installation of improved landing aids has gone a long way toward making this technically possible, — *provided* the airport approaches permit utilization of this equipment to its full potential. But the rub again is the cost of protecting these approaches. It has been estimated that the scheduled airlines in 1948 lost millions of dollars because of weather delays and cancellations. Here again the scheduled airlines could expect a handsome profit from sound business arrangements with airport operators which would permit the airports to finance the acquisition of land and air easements and the marking of obstructions so as to realize the full benefits of the costly landing aids which the Federal government is now installing throughout the country.

Runway Layout

Expansion of present airports and planning of new airports brings into sharp focus the problem of runway layout and its effect on costs of operation of scheduled airlines. The problem has two facets:

1 — The number of runways to be provided.

2 — The layout of those runways.

Larger and heavier aircraft now in use and in prospect can land and take-off safely with a much higher cross-wind component than the aircraft previously in use. This means that in most locations, there is no longer need for the conventional 3-runway airport for commercial air transportation. Substantial savings can be made in initial investment and maintenance costs by substituting a 2-runway or in some cases even a single-runway plan. A similar dividend can be realized at many existing airports by abandoning an existing runway or runways and developing non-flight revenues from the land so released. But such

planning requires close and sympathetic cooperation between the airport operator and the scheduled airlines who ultimately will reap the greatest benefit from the airport's savings from a smaller number of runways.

Entirely apart from the number of runways, their layout in relation to terminal buildings and hangars can make a great difference in the cost of operation of scheduled airlines. At many airports it is necessary to taxi a country mile to and from the hangars and the terminal building. And taxiing costs money, not only in terms of direct costs, but also in terms of reduced equipment utilization and slower schedules. Consider, for example, that in the twelve months ended September 30, 1949, there were 3,600,000 commercial aircraft movements at airports in the continental United States. If only 50¢ per movement were saved through improved airport layout which would decrease taxiing distance and time, the airlines would save $1,800,000 per year in operating costs. But such savings can only be realized through close cooperation between airlines and airport operators.

Terminal Building Design and Operation

Nowhere do the airlines and the airport operators have so strong a community of interest as in the design and operation of the terminal building. Here air transportation and ground transportation meet and are married, – either efficiently and productively, or inefficiently and unproductively. To achieve efficiency and productivity for both airline and airport operator requires agreement on objectives and operating techniques which has been missing in many negotiations.

Some airline executives see an airport as nothing more than a transportation terminal, and have a consuming desire to reduce the terminal building to a glorified platform across which to hustle their passengers with the greatest possible dispatch. Some airport executives on the other hand see an airport as everything but a transportation terminal, and would willingly subordinate the terminal handling of passengers, freight, mail, and aircraft to the sale of peanuts, popcorn, and crackerjack.

Design and operating decisions which are being made now in many major air centers can put a needless cost burden on the scheduled airlines for years to come. To avoid this burden, agreement is needed on many basic questions. For example:

1 – Should the terminal building provide for centralized or decentralized handling of air passengers?
2 – Should the terminal provide loading gates for the exclusive use of individual airlines, or should all gates be available for use in common?
3 – Should ramp service be provided by individual airlines, or on a consolidated basis either by the airlines, the airport or a private contractor?

4 — How will air freight be handled at the airport?
5 — How will porter and other terminal services be provided?

These are but a few of the many problems with respect to terminal building design and operation which have an important bearing on the costs of scheduled airlines as well as on the revenues of airport operators. There are many others. The potential savings are great enough to merit the attention of the best brains in both industries working cooperatively for their mutual advantage.

Handling of Aviation Gasoline

The increasing size and range of aircraft, coupled with heavier volumes of air traffic, have so increased the volume of gasoline loaded at individual airports as to make the problem of safe and efficient gasoline handling one of the most pressing problems now facing airport operators. It is equally important to scheduled airlines whose consumption is so great that techniques which decrease the cost a fraction of a cent per gallon will mean important dollar savings in the course of a year.

Today at most terminal-type airports the scheduled airlines buy their gasoline from a supplier of their choice who delivers it to airline storage tanks located on airport property. It is then delivered into planes by gasoline tank trunks rented from or donated by the gasoline supplier, which trucks are manned by airline personnel. As a result, each airline must have sufficient storage capacity, sufficient tank trucks, and sufficient gasoline-handling personnel to handle its own individual peak requirements. If one gasoline supplier has three airline customers at the same airport, there will be three separate storage installations for the same brand of gasoline, and three separate fleets of tank trucks for that brand, — one for each airline which uses it. At LaGuardia Airport where this technique was established by the airlines, it has been estimated that there are three times as many gasoline tank trucks in service on the airport as would be required under a more efficient system of gasoline handling.

From the airport operator's standpoint, there is a limit to the size of the tank farm which can safely be located on airport property, and to the number of gasoline tank trucks, each loaded with 2,000 to 4,000 gallons of high-octane gasoline, which can safely be accommodated on the airport highways and ramp area, — to say nothing of the cost of providing such facilities for which the airline leases frequently provide no rental payments. And the whole system becomes impracticable when one thinks in terms of loading 500,000 gallons of gasoline per day at one airport, as may be the case at New York International Airport within the next ten years.

There are several alternatives which offer a better basis both for the airport operator and for the airline. It would serve no useful purpose to pro and con each of these here. It is important, however, to

remember that the fundamental objective is to store gasoline at airports and deliver it into the planes at the lowest possible cost to the user. To achieve that objective requires airline-airport cooperation in planning efficient and economical airport facilities and procedures. Neither party can do it alone.

Financing of Airport Improvements

There is no major air traffic center whose airport doesn't require some type of capital improvement. These include new or extended runways, new or expanded terminal buildings, additional land, and air rights to protect the aerial approaches to the facility. In almost every case, however, the competition for limited municipal borrowing power is being decided in favor of schools, hospitals, libraries, streets, sewers, water systems, and other essential municipal services, and against additional general obligation funds for airport development.

Essential improvements at both Cleveland and San Francisco have been delayed more than a year because of the failure of the voters to approve the necessary bond issues in the fall of 1948. In the New York Region, it is doubtful if The Port of New York Authority would be in the airport business had not the cities of Newark and New York found it impossible further to finance their airport programs with general obligation bonds.

These examples reflect the increasing unwillingness of cities to absorb continuing airport deficits now that commercial air transportation has matured and taken its place as a permanent and essential part of the domestic transportation system. That business generally shares this view is indicated by the December, 1949, conclusion of the Transportation and Communications Department Committee of the United States Chamber of Commerce that, "Airports should be placed on a self-sustaining basis as soon as possible." Only through putting their relations with airports on a sound business basis can the scheduled airlines reasonably expect airport operators to seek to finance the heavy backlog of essential airport development required at major air terminals.

This does not mean that the scheduled airlines should pay more than their fair share of airport costs. It does involve, however, a recognition on the part of the scheduled airlines that the airport operator has an obligation to see to it that his rates reflect his costs and other pertinent factors, that they have sufficient flexibility to protect him against changes in his costs, and that they do not unjustly discriminate against any of his various classes of tenants and airport users. Such a basis for airport negotiations should certainly impose no undue burden on scheduled air carriers since these are the same factors which must, of necessity, be considered by any landlord with whom they may negotiate for space or privileges.

Conclusion

These few examples illustrate the significance to scheduled airlines of sound airport development entirely apart from the price which may finally be agreed upon for the use of such facilities. Manufacturing to a price seldom results in a high-grade product, – and that is as true of airports as it might be of hair pins. The stake which the scheduled airlines have in sound airport development is far greater than any transitory gain which may be realized through price pressures. If agreement be reached on favorable airport location, efficient and economical airport layout and design, productive airport facilities and economical airport operating procedures, it will not be difficult to arrive at a fair price for their use. But that price will be a minor factor compared to the tangible financial benefits which can accrue to the scheduled airlines from sound airport development.

THE ILLUSION OF AIR LINE SUBSIDY

By CARLETON PUTNAM

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NO phantom of the public imagination is more easy to understand, more difficult to combat, and yet more essentially false, than the illusion of air line subsidy. It haunts the halls of Congress, stalks through the press, directs the pen of scholars, and beguiles the hurried thoughts of the average man. In a recent issue of this JOURNAL an elaborate structure of analysis was built in its name,[1] starting with an assumption on which all else depended but which was never itself examined. The purpose of this article is to examine it, and to provide an amulet for readers who would be defended against such phantoms in the future.

Let us begin by realizing that there are those who have much to gain when the ghost walks and who struggle artfully for its perpetuation. The railroads, having received more than six times the "subsidy" attributed to the air lines, and the water carriers, having had twelve times as much,[2] find nothing graceless in conjuring it to rise beside the cradle of the infant brother. The bootleg air lines – and by bootleg air lines are meant operators who hold themselves out to the public as air lines but to the law as something else – partake in the ritual. And there are among the scheduled carriers a few large companies that eschewed pointing at shadows in their younger days but see nothing Punic in pointing to them now when doing so may serve to embarrass or destroy competitors.

These groups have on their side the increasing tendency of Government officials to be so harassed with a variety of problems that no time remains for a careful study of any, together with what Clifton Fadiman has called "the decline of attention" on the part of the public in recent decades to matters requiring self-induced cerebration. The writer will try to adapt himself to these conditions but begs the reader to remember that the nature of the subject precludes his doing so completely.

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[1] M. George Goodrick, *Air Mail Subsidy of Commercial Aviation*, 16 J. Air L. & Com. 253 (1949).

[2] For studies on this subject developed by the writer, see *Hearings before the Committee on Interstate and Foreign Commerce, U.S. Senate*, 81st Congress, 1st Session, Pursuant to S. Res. 50 (hereafter cited as S. Res. 50), Part 1, pp. 456-468, 486-487 (1949).

A Helpful Analogy

It will be helpful to start with an analogy which may at first seem an over-simplification but which contains all the essentials of the matter. Each morning a postman brings letters to a residence and for this service receives a salary. No one has thought of calling the salary a subsidy. But upon a certain morning the householder at the residence makes the postman a proposition. If the postman will stop on his route at the neighborhood grocery and bring the householder's daily groceries with the mail, the householder will undertake to pay the postman a certain sum for his trouble. This proposition the postman accepts, with the proviso that he will deduct the certain sum from his salary, thereby reducing the cost to the Post Office of delivering the letters. Is it now proper to say that the postman's salary has become a subsidy? Rather does it not seem that the postman has done something on behalf of the Government which makes the transaction the diametric opposite? Has he not reduced the expense of a service which otherwise would have cost the Government more to the exact extent of the householder's contribution?

The analogy to the relation between the air lines and the Post Office is complete in every respect. There is no difference in any essential factor save that the Government itself urged upon the "postman" and the "householder" the cost-reducing transaction. The first air mail was carried by the Government in Government mail planes. Then the Government made contracts with private individuals to carry the mail. Thereafter it became the practice for these contractors to carry passengers also, and they were urged to do so by the Government, in order to reduce the cost of carrying the mail. At no time was this thought of as a subsidy, any more than the payment of a letter or rural-free-delivery carrier's salary was thought of as a subsidy. Why, then, and at what point, does the further development of the passenger business turn the payment for carriage of air mail into a subsidy?

It is this writer's belief that nowhere in the annals of government can there be found a more skillful device, a more thorough procedure, to protect the federal treasury against any jot of subsidy to the air lines than that contained in Sec. 406 (b) of the Civil Aeronautics Act. The whole effort of a five-man judicial board and a staff of hundreds is bent to the task of draining out the last possible penny of payment to any air line over and above the clearly, honestly, and efficiently incurred costs of carrying the mail, minus the net income from other sources which the Board demands the air line cultivate as diligently as it cultivates economy of operations. It is as if a Board were set up to supervise every activity of our postman, to make sure all possible groceries were carried, that all receipts from this source were deducted from salary, and that any claims for larger mail sacks were carefully scrutinized.

Genesis of the Illusion

At this point, the victims of the subsidy illusion customarily answer that we are regarding the form rather than the substance, that the air lines have long since passed beyond the letter-carrier stage and must be treated as we now treat the railroads, that commercial business is the primary business of the air lines and the mail a minor matter,[3] and that there is no distinction *in substance* between land-grant aids to the railroads in the mid-nineteenth century, or other Government subsidies, and the aid channelled through mail payments to the air lines.

Let us consider this answer sympathetically. If subsidy starts at a certain place on the scale of relative volume, how do we logically find it? Is it at 40% or 50% or 60% or 90% or 73% of passenger-load predominance? We cannot come to allocated cost devices yet, nor until we transform the postman into something else. Do we accomplish this by legislative *fiat,* and if so, what principles guide the legislators? Is it a "judgment figure"? Can certified public accountants settle it, or shall we call in management engineers? If a Yale lawyer says it is a matter of route segment analysis, and a Harvard Business School study indicates it is a question of air line systems, shall we call in arbitrators or refer the issue to the circuit court?

A moment's consideration should reveal the hopelessly unscientific nature of this approach, the hit-or-miss thinking it involves, and we begin to understand why the matter today is in such confusion. Clarification begins with definition, and before we proceed further, it may be wise to attempt a definition of subsidy. The following is offered as reasonable: *a subsidy is the tendering of something for less than its economic equivalent at the time of the transaction.* Consider the railroad land grants. Millions of acres of land were tendered the railroads, without any regard to the immediate cost of railroad building or operation, for the sake of the long-term development of the country. No one disputes the policy. But there was no economic or other equivalent *at the time of the transaction.* Hence we rightly refer to this as a subsidy. Or consider the carriage of second-class mail for less than the cost of the service. There is no economic equivalent for this, either at the time of the transaction or later. So, clearly, this is a subsidy. Or take the payment to farmers of a support price for surplus food. Here something is tendered which is more than the economic equivalent of what is received, now or later. All these things fall easily within the scope of our definition.

But what of mail payments to the air lines? Here the Post Office Department pays the carriers, on an account-rendered basis, for services already performed at a price fixed by the CAB as the filtered equivalent of the actual cost of carrying the mail, reduced by the extent to which

[3] But we cannot overlook the fact that for every user of the non-mail services there are fifty users of the mail service. From the point of view of a democracy, when the diffusion of the use is considered against dead weight in the planes, the mail service is fifty times more important than the other services.

the income from other services exceeds the added cost of producing it. This, if anything, is the subsidy process in reverse. The Post Office pays less than it would be compelled to pay under any other circumstances — half to three-quarters what it would pay if it carried the mail in its own mail planes.[4] Clearly, the *quid pro quo* is "at the time of the transaction." The only area of possible debate revolves around the issue of "economic" equivalence, and it is here we come to grips with the phantom in its most seductive form.

The Allocated Cost Approach

For, at this point, the accountants enter with formulas they habitually apply to open commercial transactions, the most insidious of which is the concept of allocated costs. On an air line, this concept consists of removing from the carrier's expenses all direct costs possibly attributable to other services and then dividing the remaining costs in the ratio the ton-miles of mail carried bear to the ton-miles in other service. The result as to mail is then called "the cost of carrying the mail," and any further payment needed to keep the carrier in business, after his other income is considered, is called "subsidy." There may be some minor variations in the concept, a *soupçon* may be added for serving small towns, and a *je ne sais quoi* for operations after midnight, but by and large we can safely refer to the concept as the ton-mile allocation approach and the result, in the minds of the accountants, as the true cost of carrying the mail.

But now we face an enigma. Let us illustrate it by a simple case. Suppose we apply the ton-mile allocation approach to a certain air line and discover that the "cost" of carrying the mail is 10¢ and of the other services 90¢. But the income obtainable from the other services does not, and cannot, approach 90¢. Consequently, unless the mail pays more than 10¢, nothing moves — there is no service, no mail is carried. Under these circumstances, how can 10¢ be said to represent the true cost of carrying the mail? If it did, the mail could move. *Can it be possible to pay the true cost of moving something and yet have it remain economically impossible to move it?* Obviously, we cannot arrive at the true cost of carrying the mail until it becomes economically possible to move the mail, and this point cannot be reached until the gap between the non-mail revenues and the total cost is closed.

Or let us approach the subject from the opposite angle. Eliminating legal restrictions that do not bear upon the issue, let us assume an air line operator, confronted by an allocation formula that stigmatizes part of his mail pay as subsidy, wishes to avoid the stigma. Accordingly, he discontinues everything except his mail service. Immediately *all* his costs must be allocated to carrying the mail, so the subsidy disappears. But the cost to the Government increases! Can something be a subsidy at 10¢ a mile, and not a subsidy at 20¢? Again, obviously not.

[4] The writer makes the assumption, he believes properly for the purpose of this discussion, that the public would be entitled to a reasonable replica of the mail service it presently enjoys as regards both speed and frequency.

The ton-mile allocation concept collapses for the very reason that there is no economic equivalence between payment on an allocated cost basis and the service actually rendered. Equivalence is not reached until payment and true cost are in balance. Ton-mile allocated cost is not true cost — if it were, movement of the mail would be economically possible. The true cost is found when, by its payment, movement can begin. And, by definition, the payment of true cost cannot be subsidy.

Broadening the Analysis

It follows that the analysis must be broadened to make sure the service could not be obtained more cheaply and as adequately by other means. This includes making certain first that the cost of the ancillary services is covered by their income, and secondly that no other form or vehicle of transportation can duplicate the end result for less money. It is clear, for example, that it would be cheaper for the Post Office to carry first-class mail by truck than to support a railroad system stripped of all other functions than the carriage of mail and, consequently, if the Government were to undertake to close the gap between mail and non-mail revenues on the rails, this would be a subsidy. But it is equally clear both that the ancillary services more than cover their added cost in the air and that it would not be cheaper for the Government to fly mail otherwise than in a skeletonized air line service, if the standard service were not available.[5]

Let us beware here of falling into any fallacies as regards the passenger business. We have seen that the allocated cost theory fails because, except in the most isolated cases, the cost assigned to the mail on a ton-mile allocation basis prohibits a transaction. But it does not follow that when, on the same basis, the passenger is charged less, he is subsidized. The Government pays nothing additional to or for the movement of the passenger. It gains by his movement. We cannot classify as subsidy a transaction which not only does not involve any additional payment but actually saves the Government money.

A clearer view of this situation will be obtained if we refer again to our definition of subsidy. It may seem at first blush as if the passenger were being tendered something for less than its economic equivalent, but note that the basic tender is to the user of the air mail service and that the only tender to the passenger is the tender of the added service for which the passenger pays more than the added cost.[6] The same rea-

[5] To put the point another way, if the non-mail revenues of the railroads pay only their added costs, the remaining plant is out of all proportion to the needs of the mail service, whereas when the non-mail services of the air lines pay *their* added cost, the remaining plant is essential to the air mail service.

[6] Note further that the only tender the *Government* makes is to the user of the air mail service, that the tender to the passenger is made *by the air line*, which initiates all price and service controls bearing upon this transaction, provides at its own discretion the added service, and for it charges the passenger more than the added cost. The Government tenders nothing to the passenger in the legal sense, and nothing in the economic sense which it has not already been compelled to tender *in toto* to the user of the air mail service in the initial transaction.

soning is applicable to the user of air freight and air express. All of these services might perhaps be regarded as ancillary parasites upon the tender to the user of the air mail service, but not as objects of subsidy themselves. Even as parasites their nature is peculiar, for they give while they gain.

Subsidy to Air Mail Users

The major point has now begun to emerge. If we assume that the Post Office Department's Cost Ascertainment Report is based on sound principles of accounting, we find the Government suffering a net loss on the operation of the air mail service. Somebody must be subsidized. Who is it?

In such a situation, it would seem only natural to suspect that the subsidy in the case might be to the users of air mail. And applying the tools already developed it becomes plain that the only party to whom something is being tendered for less than its economic equivalent at the time of the transaction is the purchaser of the air mail stamp. The air lines are no more involved in this subsidy than are the workmen who build the house a man gives to his son. The man pays the workmen, but the gift is to the son. No other gift is involved.[7]

This illuminating fact has a decisive bearing upon the whole air line controversy. One cannot segregate a subsidy to the air lines when the subsidy is to someone else. The place to segregate a subsidy is in the spot where it occurs. If the subsidy is to the users of the air mail service, the place to study it, and to segregate it, is not in the accounting offices of the air lines, or in the CAB, but in the Post Office Department. The payments to the air lines, like the wages to the workmen, need be considered only once, and for what they are, as an element of true cost to which is added a proration of the Post Office Department's overhead, the sum then being balanced against the income from air mail postal revenues. If the result is a deficit, the deficit is the measure of the subsidy. Air line studies and cost allocations become meaningless.

Significance of the Distinction

Once this truth is accepted, the weary years and the useless expenditure of money and energy that would otherwise go to the futile effort to materialize a phantom are forestalled. But it seems as if the truth dawns on the victims of the illusion in two stages. The first comes with the realization that the subsidy is to the users of the air mail service, the

[7] Although the Chairman of the CAB appears at the moment to have taken inconsistent positions in the matter, the following extract from his testimony before the Senate Interstate and Foreign Commerce Committee is of interest:

Mr. O'Connell: ". . . It may be well to point out that provided the carrier's management is honest, economical and efficient, the payment by the Government of the amount necessary to meet the needs of the carrier and to furnish it with a return on its investment is not a subsidy to the carrier. Rather it is a subsidy to the persons who use the air service. . . ."

Senator Tobey: "Pardon me for interrupting you. I was interested in that last qualification about its being a subsidy for the public. Of course it is. . . ."

second when the *significance* of this fact is appreciated. One must guard against the assumption that a subsidy to the users of air mail and a subsidy to the air lines are in any way related as far as segregation, or anything else, is concerned. Government officials appear at times reluctantly to accept the true nature of the subsidy, while still pressing for some sort of mail pay segregation, a position which a moment's thought will show to be untenable. If the subsidy is to the users of the air mail service, all mail payments to the air lines are true cost payments and there is nothing to be segregated.

The following equations may assist in making this point clear. If R = air mail postal revenues, C = air line costs, O = prorated Post Office Department overhead, and S1 = subsidy to the users of the air mail service, then

$$(C + O) - R = S1 \qquad (1)$$

For the purpose of this equation, air line costs and air line mail rates must be considered synonymous, so that the equation may finally be written

$$(M + O) - R = S1 \qquad (2)$$

where M equals the total mail payments to the air carriers.

This equation bears no relation whatever to any equation that might be written under the *air line* subsidy illusion. Such an equation would necessarily read

$$C - (Rn + Ac) = S2 \qquad (3)$$

where C equals the total costs of any air line, Rn = non-mail air line revenues, Ac = the ton-mile allocated cost of carrying the mail, and S2 = subsidy to the air line. This equation is sterile because, as we have seen, Ac does not represent true cost in the majority of situations. When it does, S2 disappears, since in such situations the terms must be related by

$$C > Rn + Ac \qquad (4)$$

In any case, the absurdity of assuming identity in the two equations (2) and (3), which have only one out of four terms in common, is obvious.

Related Misconceptions

One may wonder at the slow and painful release of the mind from the enslavement of the air line subsidy illusion until one remembers the desperate purpose of those who seek to perpetuate it. Once this illusion goes, the way is open for the collapse of the whole fabric of fantasy that has been erected by the enemies of the air lines since the war, under cover of which every conceivable means has been taken to embarrass air line managements, stigmatize air line mail pay, and otherwise discount the achievements of air transportation. Magazine and newspaper articles have poured in a flood from the presses of the country, editorials have followed, commentators have joined the chorus, all

deploring the financial weakness of the air lines, their heavy subsidy, their bewildered managements, and their "increasing dependence on Government." In consequence, air line stocks have crashed on the exchanges, and the general impression prevails that the air lines are a sick, sore, and sorry segment of the economy.[8]

This is precisely what the surface transportation interests want. It perfectly suits the purpose of the bootleg air lines. A few large legitimate carriers see in such chaotic thinking the possibility of loot among the smaller scheduled companies. To dispel these fantasies must be for them an irreparable unmasking. Almost anything is worth doing to perpetuate them, regardless of the dishonesty involved.

And much dishonesty has been involved. He who wakes from the dream of air line subsidy will be amazed at the extent of his misleading. Laying aside the question of subsidy itself, let us consider just a few of the collateral deceits:

1. Instead of an "increasing dependence on Government," the fact is that the air lines in the last ten years have achieved a 65% *reduction* in their charge to the Government for the carriage of the mails.[9]

2. Instead of profligacy of management, the fact is that the air lines in the last ten years have cut seat-mile costs in half.[10]

3. Instead of a burden to the taxpayer, the fact is that the air lines through the air mail service have, up to 1948, earned back for the taxpayer $54,000,000 more than the true added costs [11] of the service to the Post Office Department. Since the overhead would have had to continue in any case, the taxpayer at the time of the study was $54,000,000 ahead in cash because of the air mail service.

4. Instead of a relatively costly subsidy to the air lines, the fact is that *the actual subsidy to users of the air mail, including Post Office Department prorates, has amounted in thirty years to about half what the subsidy to the users of second-class mail amounts to in one year.*[12]

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[8] Other contributing factors to this misconception have been considered by the writer in the Winter 1949 issue of AIR AFFAIRS, pp. 491-492.

[9] Adjusted for the change in the value of the dollar.

[10] *Idem.*

[11] By added costs are meant not simply "direct" costs, or costs allocated under the Act of June 9, 1930; the writer, with the help of the Cost Ascertainment Division of the Post Office Department, has screened all overhead of the Department and retained every expense which by any possibility might not have been incurred if there had never been an air mail service. See S. Res. 50, Part 1 of Hearings, pp. 458-461, Part 3, pp. 1340-1342.

[12] *Idem*, Part 3 of Hearings, pp. 1318-1319. Here the Postmaster General says: "As shown in the statistical exhibits attached to this statement, the total deficit incurred from the inauguration of the first air mail service in 1918 up to the close of the fiscal year 1948 amounts to $107,439,430 for both the foreign and domestic service. This may be regarded as an investment over the 30-year period." On page 1296, he says: "The present (annual) subsidy on second-class mail is about $207,000,000. The present (annual) subsidy on third-class mail is about $139,000,000. The present (annual) subsidy on the penny postal card is about $57,000,000. The present (annual) subsidy on fourth-class mail is about $82,000,000. . . . So far as the financial condition of the postal service is concerned, the so-called air mail subsidy is the least subsidy we have."

The record on these points alone surpasses beyond doubt the record of any other form of transportation in the history of this country or the world. Neither the railroads nor the water carriers can touch it. As the phantom retreats into the shadows and the truth dawns upon the mind, the shameful misrepresentations and the outright calumny visited upon the air transport industry since the war are disclosed. It is a question which is the more shocking – the traducement of the air lines or the gullibility of the public, the press, and the Congress [13] in their acceptance of the defamation. Any fair-minded examination of the record will reveal an achievement worthy of the highest praise by any standards. That the air lines for so long have been tendered just the opposite will remain one of the paradoxes of history.

Additional Economic Off-sets to the Air Mail Subsidy

Because of its many non-economic aspects and the difficulty of close statistical analysis, the contribution of the air lines to the national defense has thus far been omitted from this paper. But in evaluating the economic offsets to the public of the relatively small subsidy to the users of air mail, it cannot be entirely ignored. The writer is authorized by the Office of Public Information, Headquarters Military Air Transport Service, to quote the following statement:

> Direct relationships between the civil air carriers and MATS are always misleading because the function of the civil carriers is to provide commercial airlift, whereas the function of MATS is to maintain a nucleus prepared for great expansion to meet military requirements in time of war. In peace-time, MATS military airlift is only a by-product in MATS preparedness for war. Both the civil operators and MATS intend that their combined resources shall be used to the best national advantage in time of war. Today the combined resources of both are short of the war requirement. Consequently, if there were no civil airlines in operation, there would obviously be a very great increase in the military budget required to replace the war potential represented by the civil capacity.
>
> The exact amount of such increase, either percentage wise or on a dollar basis, is impossible to estimate because the total absence of the civil airlines would affect far more than the air transport functions of the Military Air Transport Service and the other military agencies equipped with transport aircraft.
>
> The cost of MATS air transport functions during the fiscal year 1949 was $82,527,051. As of 31 October 1949 there were 263 major transport aircraft (C-46, C-47, C-54, C-74, C-82, C-97, C-118 and C-121) assigned to the Air Transport Division of the Military Air Transport Service.

For comparative purposes it may be noted that the commercial air lines of the United States maintain a fleet of 1083 planes of equivalent

[13] The Appropriations Committees of Congress decry the "increasing appropriations for air mail," but mention is never made of the fact that the Post Office today, by comparison with pre-war years, is getting *five* times the mail carried for only *three* times the money, while paying twice the pre-war price for everything else. Nor is mention made of the subsidy to second, third, or fourth-class mail, or rural free delivery, or the penny postcard.

categories in constant activity, with a full complement of pilots and mechanics. The reader may estimate for himself the extent of the "very great increase in the military budget required to replace the war potential represented by the civil capacity" by relating 263 planes to 1083 planes, and $82,527,051 to his estimate. The approach is rough but suggestive. The figure may then be placed beside the $27,000,000 annual subsidy currently assigned to the air mail service by the Post Office Department.

Another factor difficult of analysis is the dollar value of the time saved to the passengers of the air lines by comparison with travel by rail. Studies [14] have been undertaken in this area on the assumption that the average air line passenger earns a salary of $4,000 annually, and preliminary results indicate a total saving to the national economy of not less than $130,000,000 a year, after allowance has been made for the added cost of the air ticket.

Perhaps no contribution to the general welfare has had larger significance or received less attention than this subject. The writer believes Mr. Bennett deserves great credit for introducing it to research workers in the field of air line economics. It embraces a concept, however, which extends beyond the range of economics and is succinctly expressed by the phrase, "making a neighborhood of the nation." Countless social gains are involved when horizons are at once made broader and more accessible. Many of the gains can be expressed in monetary terms, but many cannot.

Conclusion

By way, then, of summation, we find an air transport industry required by law to earn every cent of the pay it receives from the Government in the performance of a function involving a subsidy to the users of air mail of some $27,000,000 a year. By comparison, the subsidy to second-class mail is $207,000,000, to third-class mail $139,000,000, to fourth-class mail $82,000,000, and to the penny postcard $57,000,000. The cost of rural free delivery cannot be estimated. As immediate economic offsets to the subsidy to the users of air mail are the factors mentioned in the preceding paragraphs, plus the intangible value of developing a new transport industry of incalculable future possibilities.

Reference has already been made to the relative status of air transport in American transportation history, as regards both payments received from, and speed and quantity of earnbacks to, the Government.[15] We have seen that the cost to the Government of carrying the mails has declined 65% in the last ten years and that the peacetime trend has been steadily downward, so that within the foreseeable future the air lines may be earning a profit for the Government on the air mail service.

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[14] Analysis begun by J. Bennett of Washington, D.C.

[15] S. Res. 50, Part 1 of Hearings, pp. 456-466, 486-487.

The Essential Question

In the face of these various factors, the question inevitably must be asked: What justification exists for the current rash of investigations and proposed changes in the Civil Aeronautics Act? One can understand a desire to change a law when results under it have been doubtful. It is hard to understand such a desire when results have been superlatively good. Can the taxpayer or the industry afford a Roman holiday every few years for the eager young men on the staffs of Government commissions and committees, ably assisted by interests which stand to gain by disruption? The interminable analyses and re-analyses of air line accounts and statistics by Government bodies, permanent and temporary, are expensive to both the industry and the taxpayer.

Moreover, most of the proposed new legislation would tend to make the temporary analyses permanent. For example, while the writer cannot see how, by any stretch of the imagination, Government payments to the air lines can ever be termed subsidy, other approaches to these payments may be rationalized which would still involve cost allocations. It is the writer's opinion, after fifteen years of experience with the keeping of air line accounts, statistics, and other records for the Government, that further to complicate the existing requirements would be more time-consuming and expensive than could be justified by any conceivable benefit to be expected from it. It is suggested to men and women, whether in the Government, in universities or elsewhere, who wish to exercise their wits and social theories on experimental legislation, that they do so otherwise than at the expense of a successful industry and a successful Act.

It is also devoutly to be hoped that the dispelling of the illusion of air line subsidy, the envisioning of whatever subsidy exists as a subsidy to the users of the air mail service, the *significance* of this distinction, and the minor nature of the air mail subsidy in relation to other subsidies may commence a process which will purge the public consciousness of the countless collateral fallacies grown in the rank shadows of the major phantom. Such a purge is long overdue. Noticeable damage has been done the industry and its stockholders, its personnel and all who dedicated themselves to its future at the close of the war. The temper of management has become restrictive, the confidence of investors has been undermined, and the morale of employees has been lowered. This is not only an unsuitable reward to visit upon air transport but an unwholesome atmosphere in which to expect any pioneer enterprise to progress. The air lines of the United States have done their fair share in the public interest, and will continue to do so if the public is fair to them.

STATE SOVEREIGNTY IN THE NAVIGABLE AIRSPACE

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THERE appeared in the Winter 1948 issue of the JOURNAL an article entitled *"State Sovereignty vs. Federal Sovereignty of Navigable Airspace"* by John C. Cooper.[1] It was a timely and a warning discussion of a legal question with which public officials, entrusted with the development and regulation of civil aviation in the United States at both federal and state levels have been and are continuing to be confronted.

This practical problem has been brought to the forefront of public attention recently because of interpretations of the implications in the 1946 and 1947 decisions of the United States Supreme Court in the *Causby*[2] and the *California "Tidelands"*[3] cases. The *Causby* opinion rests on the theory that while owners of private property also own as much of the airspace above as may be required for normal enjoyment of the surface, the airspace above that is "within the public domain" and open for public transit free of any trespass claim. The *California "Tidelands"* case holds that the federal government has paramount interest in the area within the three mile limit off the coast of California, and in physical property above or beneath the water there. This, the Court stated, arose from the paramount *national* interest in protection of international commerce, national defense, and preservation of natural resources, and turns on the decision that the State of California never acquired such *national* prerogatives.

The implications drawn from these decisions upon State sovereignty call for vigorous and courageous action by Congress either through effective federal legislation definitely and clearly outlining the respective areas of jurisdiction in the airspace, or by the calling of a Constitutional Convention to amend the United States Constitution.

Lacking such action, the people of the respective states, as sovereigns of their own self-governments, will be projecting their future actions into a period of confusion and their tremendous investments will be a loss so great as to affect our national economy in an unprecedented manner. Each member of the United States Congress, being a representative of the people of his or her respective state, should and must

[1] 15 J. Air L. & Com. 27 (1948).
[2] *U.S. v. Causby*, 328 U.S. 256 (1946).
[3] *U.S. v. State of California*, 332 U.S. 19 (1947).

give exhaustive attention to the solution of this problem. As our civilization is projected more and more into the Air Age, the navigable airspace will be increasingly utilized for daily concerns.

I. What Is Sovereignty?

In a democracy the will of the people as expressed in their form of government, has created an entity clothed with civil and political powers with which to execute that will. In a definition of terms, one standard legal reference [4] notes that "sovereignty" in its broadest sense means "supreme, absolute, uncontrollable power, the absolute right to govern." It describes "sovereign power" as:

> "Power without limitation. Term has been applied to the people of the state in their sovereign capacity, acting through their representatives, the legislature. In all governments of constitutional limitations, sovereign power manifests itself in but three ways. By exercising the right of taxation; the right of eminent domain; and through its police power."

This same text offers a definition of "jurisdiction":[5]

> "In the absence of any particular agreement or of particular provisions in the acts of admission varying the ordinary rules, the jurisdiction of a state is coextensive with its boundaries, extending throughout its territorial limits and operating upon all the persons and things located or situated there, and, conversely, limited to its own territorial limits and not extending beyond its boundaries."

It must be remembered the thirteen sovereign colonies, in forming the United States, retained the sovereign power of self-government in the people. The people established themselves as separate sovereign states, and, after the adoption of the U.S. Constitution, whenever a new state was admitted to the Union, it was under specific written declarations that they were admitted as an equal sovereign state and retained the sovereign power of self-government save for the enumerated powers vested in the national government to wage war. enter into treaties, issue money, and govern commerce between the states and other nations. The Federal and State governments existed as separate sovereigns and jurisdiction of one over its particular field may not be interfered with by the other. This principle has been enunciated by the U.S. Supreme Court in numerous decisions from very early days.[6]

There was therefore established a dual form of sovereignty, one which is basically "internal" in character, and the other "external" in effect. The several states reserved to themselves the power to regulate matters affecting their own people, but whenever those matters required action and treatment with other states or foreign nations, the na-

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[4] 58 Corpus Juris 812.

[5] 59 Corpus Juris 18.

[6] *Crapo vs. Keely*, 16 Wall (U.S.) 113; 20 L.Ed. 122; *U.S. vs. Fox*, 94 U.S. 315; *Buffington vs. Day*, 11 Wall (U.S.) 113; *Pennoyer vs. Neff*, 95 U.S. 714; *U.S. vs. Robinson*, 74 F.Sup. 427; *New Hampshire vs. Louisiana*, 108 U.S. 76.

tional government was to exercise its "external" powers.[7] The Tenth Amendment to the Constitution provides that "The powers, not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

It has therefore become a recognized rule of constitutional construction that the government of the United States is one of enumerated powers. Yet since the historic days of the adoption of the Constitution there has been a slow but consistent assumption by the federal government of powers affecting the internal affairs of the several states, allegedly to advance the general welfare and national economy. As the Honorable Julian P. Alexander wrote only two years ago:[8]

> "The reasons for these accessions of power cannot be simply stated. As safe a judgment as any is that the Union has expanded its powers because the States have spoken too often of States' rights when they should have been pondering States' duties. Usurpation of power by the National Government has developed because: (1) it has recognized new duties; and (2) because the States have ignored old duties. The Union has picked up a lot of loose powers which the States left lying around.
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> "Between the admitted sectors of powers granted and powers reserved lay a disputed area of 'implied powers' and of powers deemed 'necessary and proper.' Into this penumbra, the judiciary guided the steps of the executive and legislative branches with a flickering light which, while sufficient to locate and stake its claim of preemption, unfortunately, cast foreboding shadows.
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> "The 'interstate commerce' clause has been a golden gate of opportunity through which have poured the forces of federal usurpation under the aegis of 'implied powers.' Practically every activity is seen as being 'affected with a public interest.' I need not trace the history of a tendency that has been given repeated impulses and only token setbacks through the intervening years.[9]
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> "By 1935, a federal court had asserted boldly that the States had virtually surrendered all powers they could not efficiently exercise.[10] It was held in June of 1942[11] that Congress can regulate the wages and hours of work for anyone engaged in any occupation necessary to the production of goods not *in* but *for*, interstate commerce.
>
> "No one need question the integrity and open frankness of the Supreme Court in pronouncing, without circumlocution, that legislation must be construed 'in the context of the history of federal absorption of governmental authority over industrial enterprise,'[12] and the admission, nay the assertion, that the Act is one of those which 'radically readjusts the balance of state and national authority.'[13] I quote further: 'To a considerable extent the task is one of

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[7] *Toomer vs. Witsell*, 73 F. Sup. 371; *U.S. vs. Curtiss Wright Corp.*, 299 U.S. 304 (1936); 2 TIEDEMAN: STATE AND FEDERAL CONTROL OF PERSONS AND PROPERTY, 1008 et seq.

[8] Alexander, *"States of the Union: Time to Start Restoring Their Powers,"* 33 A. B. A. Jour. (1947).

[9] *U.S. vs. DeWitt*, 9 Wall 41 (1869); *Sullen vs. State*, 4 So.(2d) 356 (1941); Bryce, The American Commonwealth 321.

[10] *R. C. Tway Coal Co. vs. Glenn*, 12 F.Sup. 570, 589 (W. D. Ky. 1935).

[11] *A. B. Kirschbaum Co. vs. Walling*, 316 U.S. 517 (1942).

[12] Id. at 523.

[13] Id. at 522.

> accommodation as between assertions of new federal authority and historic functions of the individual states.'[14] Whence this 'new federal authority'? Were such powers reserved, not to the States, but to the Union, after all? Bryce was right—the Constitution has not been broken—but its elasticity has met every requirement of the Federal Bureau of Standards."[15]

Not only the states and their governments have realized the encroachments on their sovereign rights, but that great scholars and thinkers formerly associated with the United States Supreme Court have felt keenly the untenable position of conflicting Federal-State government is seen in *"A Constitutional Amendment to Curb Federal Centralization,"* by the Honorable Owen J. Roberts, President of the Pennsylvania Bar Association, Retired Associate Justice of the Supreme Court of the United States.[16] His proposal to remedy this situation follows:

> "Nevertheless, I think it might be a salutary thing if political leaders and influential citizens should initiate a movement to amend ARTICLE 1, SECTION 8, so as to define the general welfare which Congress may promote by appropriation and to define what is a permissible federal regulation of interstate commerce. The provisions I have quoted seem to me to be the loop-holes through which the federal invasion has poured into the domain of the States. It would be interesting, I think, to determine how far our people generally are loyal to the spirit and concept of the Constitution in these respects. We should at least discover *whether there is a sentiment to preserve, protect, and foster State jurisdiction and State power, or whether our people prefer something more nearly approaching alien systems, wherein the States are mere administrative districts of a central government."*

There is a glimmering of light in the public awareness that taxes are the underlying moving force of the trend toward federal usurpation of power to govern the internal affairs of states. With more tax funds at its command, the federal government agencies are impelled to create more needs to be encompassed within "the public interest." The Michigan Legislature in April of 1949 passed a concurrent resolution making application to the Congress of the United States for the calling of a Convention to propose an Amendment to the Constitution of the United States to provide for a return to the states of certain taxes or portions thereof as a matter of right.[17] It reads in part as follows:

> "Whereas, the federal government is using and has been using for a number of years, the taxing power to produce revenue beyond a legitimate necessity of a federal government, other than defense needs, and *has been using the funds so raised to invade the province*

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[14] Id. at 520.

[15] President Roosevelt had given no little impetus to this tendency in a radio speech March 2, 1930. "The United States Constitution has proven itself a most marvelously elastic combination of rules of government ever written."

[16] A.B.A.J. August 1948, p. 649.

[17] The Michigan Proposal to Amend the Constitution of the United States Relative to Taxing Power—By the Joint Committee of the Legislature Created to Advance the Proposal—booklets may be secured by writing to Eugene F. Sharkoff, Secretary, P.O. Box 240, Lansing, Michigan.

> *of legislation of the states and to appropriate in many fields that which amounts to a dole to the states* of the money raised therefrom to accomplish many purposes, most of them worthy, but by the described process *making the money available only under conditions which result* in a control by the federal government from centralized agencies in Washington, in many cases unfit, and in other cases unable to administer the laws according to the local needs because of varying conditions in the country as a whole; resulting in inequities in the administration of the very benefits purported to be granted; and
>
> "Whereas, State and local needs are disadvantaged because the people are already taxed far beyond the real need for any purpose other than *forcing the centralization of all government in Washington;* and
>
> "Whereas, the framers of the Constitution of the United States clearly foresaw the possibility of a condition similar to that herein described, *and made provision in the Constitution for safeguarding the states against any oppression or invasion of rights by the federal government;* therefore be it
>
> "Resolved, by the Legislature of the State of Michigan; That said Legislature, hereby and pursuant to Article V of the Constitution of the United States, makes application to the Congress of the United States to call a convention for the proposing of the following amendment to the Constitution of the United States: . . ."

The writer has felt it necessary to trace "sovereignty" in some detail, because there are many instances of unsound arguments being used for federal usurpation of power. This is now being seen in the field of aviation.

Before going into the navigable airspace sovereignty phase, there is cited one further recent example.[18] The military services, without so much as a "beg your leave," attempted to set off a large area of one of the Great Lakes, more specifically two large areas in Lake Huron for an aerial gunnery range. It was their intention to exclude from these areas all boats, whether pleasure, commercial, or industrial, and also whether intra-state or inter-state. Through that area pass the endless number of ore and wheat and other commodities boats from the uppermost points in Lake Superior down to the Atlantic Ocean and intermediate industrial points. Obviously, to all intents and purposes, it was their further intention that these areas would be under the exclusive control and jurisdiction of the military establishments of the federal government to the end that their personnel might have free, unhampered, unhindered and uninterrupted control over and use of those areas of water!! As the Attorney General, the Honorable Stephen J. Roth, stated in his exhaustive brief in behalf of the sovereign state of Michigan: "The State of Michigan is one of the sovereign states of the

[18] Statement by Nicholas V. Olds, Assistant Attorney General for the State of Michigan before the Senate Committee on Interior and Insular Affairs Concerning the Ownership of that portion of the Great Lakes within the Territorial Boundaries of the State of Michigan, Oct. 1949.

United States of America. *It cannot be treated as occupied territory of an enemy nation."*[19]

Sovereignty as Found in Aviation Law

Section 6 of the Air Commerce Act of 1926[20] stated that the United States government "has, to the exclusion of all foreign nations, complete sovereignty of the airspace over the lands and waters of the United States"; and Section 10[21] defined navigable airspace as airspace above the minimum safe altitudes of flight set forth in the Act. Section 1107 (i) (3) [22] of the Civil Aeronautics Act of 1938 amended Section 6 of the Air Commerce Act of 1926 so as to read:

> "The United States of America is hereby declared to possess and exercise complete and exclusive national sovereignty in the air space above the United States, including the air space above all inland waters and the air space above those portions of the adjacent marginal high seas, bays, and lakes, *over which by international law or treaty or convention the United States exercises national jurisdiction."* (Italics added.)

It should be noted also that the multilateral Convention on International Civil Aviation concluded at Chicago in 1944 is based[23] upon the complete and exclusive *national sovereignty* of the signatory powers, as are the bilateral executive agreements for the exchange of air landing rights negotiated both before and after that important compact.

Then came the oft discussed *Causby* decision of 1946 construing the 1926 and 1938 statutes, an opinion which one distinguished advocate of federal supremacy in the skies has interpreted[24] as meaning that "in the upper zone (the navigable airspace) the rights of the Federal Government seem to have been considered so paramount that Congress was able to place the navigable airspace, as stated in the Court's opinion, 'within the public domain.' "

Reading the *Causby* and *California "Tidelands"* cases together, that same author concluded that "Either the several States may be held under these rulings to be entirely without sovereignty or right of control in the navigable airspace over their surface territories, or the power and rights of the Federal government may be found so paramount in the navigable airspace as to produce the same legal results."[25]

There is also put forth the argument that the navigable airspace being capable of being construed as "public domain" by virtue of the

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[19] Brief of the Attorney General of Michigan, the Hon. Stephen J. Roth, filed with U.S. Military Establishment and U.S. Corps of Engineers, January 1949.

[20] 44 Stat. 572, 49 USCA 176 (Supp. 1947).

[21] 44 Stat. 574, 49 USCA 181 (Supp. 1947).

[22] 52 Stat. 1027, 49 USCA 677 (Supp. 1947).

[23] Article 1.

[24] Cooper, *State Sovereignty vs. Federal Sovereignty of Navigable Airspace*, 15 J. Air L. & Com. 27 (1948).

[25] *Ibid.*

Tidelands decision it may be treated as "new territory" which the states have no constitutional right to acquire, a prerogative solely resting in the federal government!

Having reviewed the highlights of some of the points frequently utilized by those who preach complete federal supremacy, it is now necessary to test them in the light of the law. This may serve to illuminate properly certain aspects of the problem which have received comparatively little attention in an era of continually growing federal power.

External and Internal Sovereignty

One may begin by observing that the question of state or federal sovereignty over the navigable airspace is obviously a constitutional one, and can be resolved only by definitive interpretation of the United States Constitution by the appropriate judicial authorities, or by an amendment to the Constitution itself. Mere statements that complete and exclusive sovereignty is in the United States, such as those embodied in the Air Commerce Act of 1926 and in the Civil Aeronautics Act of 1938, cannot be of any genuine assistance in finding a solution. First, they must be viewed as legislative announcements by the national government that it has and will exercise full control over these skies *in the society of nations,* i.e., declarations of exclusive sovereignty vis-a-vis foreign powers, but hardly controlling on fundamental constitutional questions such as *internal* sovereignty. This distinction between *internal* and *external* sovereignty has been accepted even by those who favor federal supremacy.[26] Second, it must be recognized that a mere statute cannot give the federal government power which it does not have under the Constitution.[27]

Nor is the exclusive *external* federal sovereignty expressed and/or implied in the Chicago Convention and the bilateral agreements decisive, for while a treaty may be the supreme law of the land there is no basis for an argument that one may override the Constitution. In any case, both the Chicago text and the executive agreements deal solely with *external* sovereignty.

There is some good old-fashioned case law on the problem, however, decisions which clearly imply that the federal government *does not* have complete sovereignty over the navigable airspace above the United States to the exclusion of state authority. It was two years after passage of the Air Commerce Act that Chief Justice Rugg of the Supreme Judicial Court of Massachusetts held:[28]

> "It is essential to the safety of sovereign States that they possess jurisdiction to control the airspace above their territories. It seems to us to rest on the obvious practical necessity of self-protec-

[26] Id at note 10.
[27] Id at note 8.
[28] *Smith vs. New England Aircraft Company, Inc.,* 170 N.W. 285 (1930).

> tion. Every government completely sovereign in character must possess power to prevent from entering its confines those whom it determines to be undesirable. That power extends to the exclusion from the air of all hostile persons or demonstrations, and to the regulation of passage through the air of all persons in the interests of the public welfare and the safety of those on the face of the earth. This jurisdiction was vested in this Commonwealth when it became a sovereign State on its separation from Great Britain. So far as concerns interstate commerce, postal service, and some other matters, jurisdiction over passage through the air in large part was surrendered to the United States by the adoption of the Federal Constitution."

It was to achieve just this self-protection to which their citizens were entitled that the several governments of the States passed various regulations [29] concerning the operation of aircraft within the airspace above their territories. In a 1935 decision in *Parker v. Granger* [30] which was later approved by the Supreme Court of California,[31] and which was denied *certiorari* by the United States Supreme Court,[32] it was ruled:

> "The flight of the planes mentioned herein was intra-state, and under the federal Constitution and the California Aircraft Act enacted in 1929 (St. 1929, p. 1874), the state of California was vested with exclusive power to prescribe air traffic rules to govern the operation of aircraft in flying in purely intrastate flights."

In addition, one should take into account the 1944 Opinion of the Minnesota Supreme Court in *Erickson v. King as State Auditor of the State of Minnesota* which declared:[33]

> "Subject to the jurisdiction conferred upon Congress by the federal Constitution relative to post roads, interstate commerce, and national defense, the state has complete sovereignty of the air above its territory and may exert its police power therein."

These cases seem to indicate that certain aspects of air navigation are properly within the jurisdiction of the state governments, and that there is a legal duty for the state governments to protect the local interests of their inhabitants.

Yet, despite these decisions, both the Civil Aeronautics Board and the Civil Aeronautics Administration appear to be intent upon interpreting Section 1 (3) of the Act of 1938 [34] so that practically all flying comes under federal control. There has been a pursuing of this policy deliberately, arguing that just about every flight is likely either to affect directly or endanger safety in interstate, overseas, or foreign air commerce. This is clearly a dangerous oversimplification of the facts, and a threat of future federal intervention in intrastate aeronautics, and the right of the states to protect their citizens under their police power from

[29] STILL, STATE AVIATION LAWS, Pub. Affairs Bull. No. 53, Legislative Ref. Ser. of Library of Congress, Washington (1947).
[30] 39 P.(2d) 833 (1935).
[31] 52 P.(2) 226 (1935).
[32] 298 U.S. 644 (1936).
[33] 15 N.W.(2d) 201 (1944).
[34] 52 Stat. 977, 49 USCA 401 (Supp. 1947).

dangerous use of the air by anyone. It is another manifestation of the continuing invasion of state responsibility and power. Can it be said that the states have no right to regulate and police the airports used by aircraft which are constructed upon land located within their jurisdiction? Can it be said that if a felon has committed a bank robbery and a murder in the course of it, and uses a plane for his getaway, but while in flight he traverses a federal airway on which interstate scheduled airlines may have a route, his flight so affects interstate commerce as to make him immune to the state's police powers?

A Look into the Causby and California "Tidelands" Cases

Before the decisions in the *Causby* and *California "Tidelands"* litigation, proponents of exclusive federal control over navigable airspace relied principally upon the power of Congress to regulate interstate commerce,[35] provide for the common defense and the general welfare,[36] and to establish post roads[37] for constitutional support. A newer theory as to the constitutional basis for exclusive federal control over navigable airspace has been evolving from those two cases. It holds that, as in the case of the tidelands, the federal government has a *proprietary* interest in navigable airspace over land within its boundaries and thereby exclusive power to regulate the use thereof. Federal power would be absolute and exclusive, as in the case of other property owned by the national government,[38] and would not be dependent upon the above mentioned constitutional clauses. This is the newest brain child proposed to usurp still further the power of the states to protect its citizens from malignant uses of the air!

Careful consideration of this theory is essential. So far as the private property owner is concerned, the superadjacent *non*-navigable airspace below safe altitudes of flight prescribed by the CAA is so close to the land, that continuous invasions of it affect the use of the surface of the land itself. Therefore, such *non*-navigable airspace has the quality of *property,* and as an incident to his ownership of the land, the landowner has a claim to such non-navigable airspace. Invasions of it are like trespass on the surface, and the rights of the private property-owner are paramount in such non-navigable airspace. The Supreme Court has held, however,[39] that he has no rights in the navigable airspace, — for it is in the "public domain."

Should the Supreme Court later conclude that the *navigable* airspace has the qualities of property, also, it might apply the tests utilized in the *California "Tidelands"* case to find no valid State claim. It might find that problems of national and international use of such airspace are such as to require exclusive federal control. But while one

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[35] U.S. Constitution, Art. 1, Sec. 8, clause 3.
[36] Id, clause 1.
[37] Id, clause 7.
[38] *Utah Power & Light Co. vs. U.S.*, 243 U.S. 389, at 404-5 (1917).
[39] *U.S. vs. Causby*, 328 U.S. 256, at 261-7 (1946).

may comprehend how non-navigable airspace may be so intimately connected with the use of the land as to be substantially a part of the surface itself and have qualities of property, it is difficult to visualize how the navigable airspace may possess such qualities. The former is relatively confined in area, – that is patterned after the area on the ground and upward for a relatively short distance, – and control thereover may be asserted and made reasonably effective. But the latter begins where the limits of effective control substantially end, and extends outward to infinity.[40] For all practical purposes, it is beyond control at the present time, unless a modern Magi can conjure a magic carpet to suspend at various levels in the air for purposes of federal determination of its proprietary rights in that domain!

It is interesting to observe that in the *Causby* case the Supreme Court attributed qualities of property only to the *non*-navigable airspace, and stated that the navigable airspace was in the public domain. The Court cited with approval [41] the opinion of the Court of Appeals of the Ninth Circuit in *Hinman v. Pacific Air Transport,*[42] which held that the navigable airspace "belongs to the world." The rationale leading to this is founded on the premise that "the air, like the sea, is by its nature incapable of private ownership, except insofar as one may actually use it." If applied by analogy, the *California "Tidelands"* decision would affect only the *non*-navigable airspace, and the tenor of the opinion is such as to favor a belief that the Supreme Court would resolve any conflict of jurisdiction over *non*-navigable airspace with a ruling for the States.

Not only are fundamental principles of constitutional law involved here, but the practical aspects of self-government of local affairs by the people take on greater importance. It is of no difference to the victim on the ground whether the object is dropped on him from the air below or within the navigable airspace. His private rights are invaded just as forcibly and damagingly, and the citizen looks to his state government to protect such rights through the police power which the people have delegated to it.

Conclusions

1. The United States Supreme Court's decisions in the *Causby* and the *California "Tidelands"* cases have brought about an untenable position for the states, as those decisions may affect their rights in the navigable airspace over their respective territorial jurisdictions.
2. Sovereignty, as defined for federal powers delegated to the central government in the Constitution, is for national and external concerns, and not as justification for encroachment on the

[40] See, Sweeney, *Adjusting the Conflicting Interests of Landowners and Aviator in Anglo-American Law*, 3 J. Air Law 329, 347-55 (1932).
[41] *U.S. vs. Causby*, 328 U.S. 256 at 264.
[42] 84 F.(2d) 755, at 758 (9th CCA, 1936).

sovereignty of the states in matters of outright local internal concerns.

3. National or external concerns affecting use of the air remain as they have been since the adoption of the Constitution in the federal government, and their purposes are in protection of this Nation viz-a-viz other Nations, the international use of the airspace over the United States and its territories, and over commerce among the states.

4. Federal usurpation of state sovereignty by steadily growing expanding interpretations of the "commerce clause" and now "proprietary interest" of the federal government, either through direct legislation, interpretations of law by means of regulations and procedures of federal bureaus, and by use of medium of federal grants-in-aid, has reached proportions entirely foreign to the form of government intended by the original drafters of the Constitution and the spirit of the form of self-government the people still believe in.

5. The police powers of a state in protection of the public welfare within its territorial jurisdiction is inherent with its sovereignty.

6. The United States Supreme Court in interpreting federal powers of acquisition of so-called new territory "without the consent of the people" has gone beyond historic principles of constitutional delegation of powers, and brings about a fallacious premise upon which advocates of federal sovereignty in the navigable airspace predicate their arguments.

7. Legislation by Congress clearly defining areas of federal-state jurisdictions in the navigable airspace, bearing in mind the dual sovereign character of our system of government, is one of the needed solutions. In the alternative, only a constitutional amendment can resolve the problem, if the Congress fails to act.

It is hoped that something less drastic than a Constitutional Amendment may suffice to protect the interest of the States in the navigable airspace. The legitimacy of this concern has been well established by competent legal authorities,[43] and the time is at hand for some form of courageous action.

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[43] See the article on *The Air Domain of the United States* by Frederic P. Lee, then legislative counsel for the United States Senate, in the LEGISLATIVE HISTORY OF THE AIR COMMERCE ACT OF 1926 issued by the Government Printing Office in 1928 and reprinted in 1943; also Bouvè, *State Sovereignty or International Sovereignty over Navigable Airspace*, 3 J.D.C. Bar Ass'n. 5(1936) and Bouvè, *The Development of International Rules of Conduct in Air Navigation*, 1 Air L. Rev. 1 (1930).

ANALYSIS OF THE CIVIL AERONAUTICS BOARD'S PRECEDENTS IN SAFETY ENFORCEMENT CASES

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THE Civil Aeronautics Act of 1938 became effective in August 1938.[1] There is now more than a ten years' accumulation of decisions issued under this Act. These are sufficient to establish a pattern which should be of assistance to pilots in particular, and to counsel who may, from time to time, be called upon to advise or represent persons in safety enforcement cases.[2] This article will be confined to a summary of cases involving an interpretation of the Act and the Regulations for air safety [3] and to cases showing the policies of the Board with respect to the type of sanctions imposed in various types of violations involved. Disciplinary cases, as contrasted with cases relating solely to competency, will be stressed.

In safety enforcement, policies of the Civil Aeronautics Board cover a large field, since they comprise both the promulgation of regulations affecting air safety and also enforcement action. All interpretations of the Civil Air Regulations, as well as the imposition of appropriate sanctions [4] of suspensions and revocation, are based on the policy of the Board rather than on strict legal interpretation. As an administrative

* The authors plan a subsequent article on competency cases, and cases relating particularly to student pilot, private or commercial pilot and other ratings.

[1] Herein the Civil Aeronautics Act of 1938, June 23, 1938, c. 601, 52 Stat. 977, 49 USC 401, as amended, will be referred to as the Act. The Civil Aeronautics Board, and its predecessor, the Civil Aeronautics Authority will be referred to as the Board, and the Administrator of Civil Aeronautics as the Administrator.

[2] For an earlier article by the authors on procedure, see 16 J. Air L. 40-52. New Rules of Practice have been promulgated, Dec. 8, 1949, since the publication of this article, which gave citation to the old rules contained in Part 97 of the Civil Air Regulations. The new Rules of Practice for safety enforcement proceedings are not in the Civil Air Regulations but are separately published in the Code of Federal Regulations, 14 C.F.R. Part 301.

[3] The Civil Air Regulations, Title 14, Code of Federal Regulations.

[4] The terminology, "sanction," is apt for the remedial, non-penal orders issued, but is of comparatively recent usage in safety enforcement proceedings practice. Present Board use of such terminology accords with the wording of the Administrative Procedure Act, as in its section 7(c).

agency, the Board is not bound by judicial doctrines of *stare decisis* or *res adjudicata.*[5] The Board is free to change the basic philosophy expressed in its regulations, or vary the severity of the sanction deemed necessary for particular classes of violations [6] from time to time for the enforcement of air safety. However, substantial uniformity is maintained, with the imposition of sanctions in different cases varying to accord with the circumstances of the violation and the probable effect which orders will have on the individual and upon others.

A basic change in Board policy was evidenced by the revision of the Civil Air Regulations in 1945. In this revision the Board departed from its previous philosophy of paternal treatment for the pilot and, in fact, recognized his adulthood. The most significant words in the regulations showing the Board's departure are those of the present Section 60.102 of the Civil Air Regulations requiring a showing that the pilots' acts have endangered "the person or property of another" in order to establish a violation of the carelessness rule. It had, before that time, been uniformly held that a pilot would be subject to suspension or revocation if he performed any unnecessary maneuver which might be careless, even though it was performed under such circumstances that no one could possibly be hurt but himself, and no property of another be damaged.[7] The change to the new rule made it clear that the pilot might take a chance so long as he was not endangering the person or property of others.

Causes for Sanctions

Careless Flying

The Board's philosophy [8] with regard to the carelessness rule has been attacked occasionally on the ground that it is ambiguous, provides a trap for the pilot and is wholly unfair in that the pilot cannot know what is a careless or reckless operation of an aircraft. However, if a pilot does not know what is careless or reckless operation which may endanger another, his competency is certainly doubtful. This is clearly true with regard to experienced pilots. Under Board interpretation, students are not held to the same degree of knowledge or technique, and from the practical viewpoint their flying is supervised by flight

[5] *State Airlines, Inc.* vs. *C.A.B.*, 174 F2d 510, (Apps. D.C. 1949) citing 1 VOM BAUER, FEDERAL ADMINISTRATIVE LAW (1942), pp. 74, 183 and 255-9.

[6] See, for instance, discussion hereinafter relating to the operation of aircraft by a pilot under the influence of intoxicating liquor, footnote 69. In a subsequent article, considerable discussions will be devoted to the sanction policy as it has been developed with regard to student pilots carrying passengers.

[7] The change of philosophy is, of course, also reflected in other provisions of the Civil Air Regulations, as for example in the change of the former 500 foot altitude minimum to the terms of the present Section 60.107(c) which permits flight under that altitude over open water or in sparsely settled areas when the pilot does not fly closer than 500 feet to a person, vehicle or structure on the surface, nor violate the above stated prohibition against carelessness or recklessness endangering the lives or property of others.

[8] See statement of CAB Chairman L. Welch Pogue in magazine *Sky Lady*, September-October 1945.

instructors who are held to high standards. If student pilots follow their instructions, they are not likely to be involved with regulations. The simplest reply to the attack can be made by reference to the results of experts who have collaborated in the study of motor vehicle traffic laws, which are of course enacted to meet a similar problem in surface transportation. The Uniform Act Regulating Traffic on Highways, sponsored by the National Conference of Commissioners on Uniform State Laws, contains a provision similar to that of the present regulations.[9]

Certificates are hardly ever suspended or revoked for a violation of carelessness or recklessness alone, but for clear violations of one or more other regulations under circumstances which require the conclusion that the pilot was also flying carelessly or recklessly so as to endanger the lives or property of others. Similarly, a finding of such carelessness or recklessness is usually made when suspension or revocation is ordered. A conclusion (or ultimate finding or mixed conclusion of law and fact) rather than a purely factual finding of carelessness may be made on the basis of the proved violation of regulations other than Section 60.102 when no specific danger to the persons or property of others is proved.

For example, where in the records there has been basis for a presumptive finding that as a matter of law, the pilot's conduct carelessly endangered others or their property. An illustration is provided by the recent proceeding,[10] wherein the Board in affirmance of an examiner ordered the revocation of a student pilot's certificate but reversed the examiner's finding that Respondent had operated an aircraft in a careless and reckless manner so as to endanger the lives and property of others. The student had, contrary to regulations, operated an unairworthy aircraft on cross-country flights for which he was not authorized, but *no specific evidence* of danger was submitted by the Administrator's attorney. Upon the presumptive proof of the proceeding, the final conclusion of carelessness could have been rested. not upon the Administrator's proof of specific factual danger to others, but upon law. In fact, of course, it would stand to reason that such conduct by a student pilot would in all probability endanger others than himself.[11]

In the Act, Title VI is captioned "Civil Aeronautics Safety Regulation," with the subtitle, "General Safety Powers and Duties." The Board's policy with regard to certificates proceeded against under section 609 is based upon safety. Such basis now precludes consideration of moral characteristics not affecting the development and safety of air commerce.[12]

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[9] Section 10. Uniform Act Regulating Traffic on Highways, 11 Uniform, Laws Annotated, 20. See also Section 20 of the same Act.

[10] *Marvin Kohn*, SR-1-360 (1949).

[11] See also *Paul C. Humphreys*, SR-1608 (1946) where a pilot's certificate was suspended for 30 days for low flight which involved no carelessness or recklessness.

[12] Discussion hereinafter of decisions involving moral qualifications will advert to the relationship of morals to safety in aircraft operation.

In safety enforcement proceedings, the Board does not adjudicate issues which lack direct or indirect bearing on air safety. In the *Dansville Flying Service* case it was alleged that the holder of an air agency certificate had rented government owned planes to private persons, from which rental income was said to have been not properly accounted for.[13] The Board found itself without jurisdiction and in dismissing the complaint, stated, "there is no evidence that the action established had any effect on the safety of aircraft operation, and the record does not establish any lack of integrity of the Respondent." The Board concluded that if the government was entitled to compensation or damages, such claims should be presented before a different tribunal.

Violations of Weather Regulations

The Civil Air Regulations forbid non-instrument pilots to operate aircraft under instrument conditions of restricted visibility and ceiling, and also prohibit the operation of aircraft within control areas and control zone under instrument conditions without clearance.[14] Such requirements are furthered by provision that a pilot should investigate flight conditions before taking off.[15] Serious accidents can result from violation of these provisions.[16]

The sanctions which have been imposed by the Board in cases of weather violations range from revocation to suspensions for short periods. In the case of *Charles Farries Thackell* [17] the Board revoked a pilot's certificate for flying under instrument conditions without a rating or equipment for such flight although he was familiar with the country over which he flew and represented that he needed the use of an aircraft in his business. In the case of *Robert C. C. Heaney* [18] a pilot was cleared by the tower at the airport from which he took off but the tower lacked authority for such approval since it was not an Airway Control Center and presumably relied on the pilot in assuming him qualified. The pilot of an airline transport scheduled to take off shortly thereafter heard that first pilot did not have an instrument rating and had filed no flight plan, whereupon he declined to leave the ground until his position could be ascertained. The guilty pilot was called back and thereafter his certificate was suspended for a period of 60 days.

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[13] *Dansville Flying Service, Incorporated,* SR-693, (1944).

[14] CAR, Part 60.3.

[15] CAR, section 60.101.

[16] See, "If You Don't Know Flying," Safety Bulletin 182-48 CAB released February 1, 1949 (Harold G. Crowley). See also, "Runways Shrink!" released May 14, 1948, Safety Bulletin No. 180-48 CAB, H. G. Crowley; and "Cold Weather Safety," Safety Bulletin No. 181-48 CAB, by Fred G. Powell, released September 1, 1948.

[17] SR-1976 (1949). In another case involving mitigating circumstances, the Board terminated a suspension of 6 months against the private pilot certificate of a business man, permitting the Administrator to accept a civil penalty of $200, *David Hopkins Jenkins,* SR-1-89 (1947).

[18] SR-3-55 (1947).

Discontinuing a Flight

The occurrence of instrument weather requiring a pilot to discontinue plans which were properly safe at take-off has resulted in violations of the Regulations when pilots did not heed the change in weather. In the case of *Richard E. Fennelly,* a private pilot took off on a flight to New Haven, Connecticut from Washington, D. C., but failed to land when he encountered bad weather near Philadelphia. His continuance of the flight resulted in his letting down through an overcast at Scarsdale, New York attempting a landing there with damage to his aircraft and minor injuries to himself and a passenger. His pilot certificate was suspended for six months.[19] Even student pilots are held to accountability in observation of weather conditions.[20] Thus, in the case of *Carroll George Pryor* [21] the student pilot took off with a low ceiling of 400 feet upon his flight instructor's advice that weather conditions were adequate. The student pilot's certificate was suspended for 30 days. In the case of *Edward Downey* [22] a student was sent on his first cross country solo by a flight school which may have been misinformed or had misunderstood the official weather report that weather would become bad in the locality the student was to traverse. Encountering weather which closed in in front and in back of him, the student entered a controlled airport without permission and endangered airline traffic. The Board reversed a decision suspending the student's certificate for 6 months in view of the school's responsibilities upon the facts, but nevertheless imposed a suspension of 30 days for the violation. In the case the student did not prove that when weather turned bad he could not have landed in a field, pasture, or small airport and thus avoided the necessity of entering the control zone.[23]

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[19] SR-1-45 (1947); see also *William Otis Burt,* SR-1-131 (1945) and *Walter James Konantz,* SR-1327 (1946) where commercial pilot certificates were suspended for 3 months in each case.

[20] SR-1-45; in cases involving certain other violations, students are exonerated in substantial part from responsibility when they have acted upon the advice of their instructors. For instance, in the case of *LeRoy Edward Kent,* SR-1881 (1947) a student was executing spin recoveries at a low altitude over ranch country in the west in accordance with a suggestion by his instructor that the altitude was sufficient, and the Board upon reconsideration withdrew an order revoking the student pilot's certificate and entered an order suspending the certificate for the period of time for which it had already been held by the Administrator.

[21] SR-5-118 (1947).

[22] SR-3-92 (1948).

[23] When aircraft are seen operating without a clearance by control tower operator, the operators will protect scheduled air transports by refusing clearance into or out of the zone until the aircraft potentially endangering them has landed. In the case of *Elliott Cohen,* SR-5-342 (1949) a private aircraft which was flown into a control zone in instrument weather contrary to tower directions at Lambert Field, St. Louis, caused suspension of commercial operations there with delay of three trips on the ground and another trip in the air to protect airline passengers from the Respondent's conduct. The violation resulted in suspension of Respondent's pilot certificate for 9 months by an examiner although Respondent had need of his aircraft in a business of which he was an executive. No appeal was taken and the order became final.

Inadequate Preparations for Flight

Action has been taken against the certificates of pilots of nearly every class for making inadequate preparations for flight, in cases involving preparations other than investigation of probable weather enroute.[24] A violation will not be excused if it would not have occurred with adequate preparations. A pilot taking off at night must fly an aircraft with position lights.[25] Before carrying passengers in a night flight he must have made five night take-offs and landings.[26] The aircraft's equipment must be so checked as to prevent the failure of radio and lights because of a poor storage battery.[27] If a pilot is not qualified for night flying he must not undertake a flight if he should have anticipated arrival after dark.[28]

From the regulatory point of view, preparations for a flight may be defective in that the pilot has failed to secure a waiver from the Administrator for a flight in the nature of a stunt.[29] Thus, in the case of *Raymond Milton Edgerton,*[30] a pilot flew an aircraft over and landed on a street of Yoakum, Texas to participate in bringing a Santa Claus to a community celebration in a flight for which local safety precautions had been taken. Due to an accident that was probably not the pilot's fault, the aircraft collided with a truck used in the ceremonies. Respondent's commercial pilot certificate was suspended for a period of 60 days on emergency suspension by the Administrator, and the Board found that such disciplinary action sufficed.[31]

Use of Drugs

A pilot may not legally prepare himself for a flight by relieving a cold or other disabling condition with sulpha drugs. The Board has held that section 43.406 of the Civil Air Regulations prohibits a pilot from flying an aircraft when he is under the influence of such drugs.[32]

A pilot must ascertain that his proposed flight is within an area that will not endanger persons or property. A commercial pilot who failed

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[24] Section 60.101 CAR requires that a pilot "familiarize himself with all available information appropriate to the intended operation."

[25] Section 60.113 CAR. *Wallace Eugene Gardinier,* SR-1254 (1945).

[26] *Peter Gifford,* SR-7-107 (1949) Revocation, 1 year,—flying close to a train and automobiles.

[27] *Rockstroh,* 5 CAB 243 (1942) Suspension 6 months, low flying was involved.

[28] *Weyman Gordon McDaniel,* SR-1318 (1945).

[29] The Administrator also issues waivers for other specialized activities which do not involve stunts but could, or would in the normal course of some activities, involve violations if executed without a waiver. Such activities include banner towing, sky writing, crop dusting or spraying, and predatory animal hunting by use of aircraft. Waivers are issued for air shows, and their terms must be observed.

[30] SR-1115 (1945).

[31] In the more recent case of *Charles Marthens,* SR-6-103 (1949) a somewhat similar Christmas stunt was performed by helicopter and the examiner's decision would have suspended for 30 days the certificate of the commercial pilot. However, upon appeal to the Board, the examiner was reversed because no regulations had been promulgated applicable to the maneuvering of helicopters in congested areas. The pilot's action was not proved careless.

[32] *Wayne Hardy Dickerson,* SR-1463 (1946).

to make such preparatory investigation carried a passenger into a canyon over the town of Hot Springs, South Dakota to a vicinity where flight was intrinsically dangerous. Respondent in this case landed on a small, unused racetrack surrounded by houses. His pilot certificate was suspended for six months.[33]

With regard to the aircraft to be flown, a pilot to carry a passenger must have had recent experience in aircraft of the same type and horsepower. In prior regulations pilots were rated for aircraft by horsepower and the certificates of some pilots were suspended for attempting to operate aircraft with a horsepower greater than that for which they were certificated.[34] Also, in several cases, pilot certificates have been revoked for overloading aircraft while carrying passengers.[35]

In one case a pilot's flight instructor rating was suspended for 90 days because he neglected to run his engine up to cruising power prior to take off. The flight was made to test a recently repaired aircraft and the pilot's failure to test the engine for cruising power resulted in a serious accident.[36] In the case of *Charles Leland Osborn*,[37] an airline transport pilot's certificate was suspended for 14 days because he failed to test the elevators to the full limit of their travel prior to take off. In the early case of *Stead, et al., Airman Certificates*,[38] the Board stated that the Act calls for the highest degree of care on the part of those who sit at the controls of the airliners that carry the traveling public. In that case the pilot's airline transport rating was revoked for the principal reason that he failed to work an orientation procedure while enroute on instruments in a flight, but the order to show cause that was originally issued in the case included an allegation that he had failed to give proper consideration to the fuel supply on board or to the amount of fuel that might be required for the trip in view of adverse weather and wind conditions, prior to take off. He was exonerated of this charge.

Starting Engine

A number of pilots have subjected themselves to disciplinary proceedings because of their failure to start their aircraft engines with proper precautions. Originally, the regulations required a complicated procedure of blocking the wheels when the engine was to be started

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[33] *Wesley Warren Brishen*, SR-1828 (1947).

[34] See *G. H. Burns*, SR-889 decided June 28, 1944; *Harold Henry Hoff*, SR-973 (1944). In the latter case the Respondent was induced to fly the aircraft by a lunatic that Respondent did not know was insane. Respondent's certificate was suspended for only 30 days.

[35] See, for example, *Loren D. Johnson*, SR-1093 (1945). Therein, a passenger's life was lost in an ensuing accident, and Respondent's commercial pilot certificate was revoked.

[36] *Clifford C. Bonifield*, SR-1012 (1945).

[37] SR-1487 (1946).

[38] 1 CAAR 74 (1939); see also, *Joseph Kuhn*, SR-1944 (1949) supplemental opinion; *E. E. Basham*, SR-547 (1943), SR-623 (1943); *Charles Robert Sisto*, SR-1987 (1948) affm'd CADC (1949).

without a competent operator at the controls, but the form of the present regulations omits specific procedures and merely requires due care in this regard.[39] A pilot's carelessness in this regard may cause accidents. In one case an aircraft that the pilot attempted to start by "propping" took off and flew over the airport until it crashed in a river nearby.[40] In a recent similar case the aircraft took off and flew in airways for approximately two hours over New Jersey until it ran out of fuel, — fortunately crashing without injury to anyone in an open field.[41] When passengers are left aboard the aircraft while the pilot is "propping," such passengers may endanger themselves in their confusion or endanger both themselves and the aircraft. In one case, a passenger in a shoal-grounded seaplane became frightened because unaccompanied and in attempting to go ashore by way of a pontoon put her hand into a whirling propeller which she did not see.[42] In the case of *Mohamed Joseph Shaik*,[43] Respondent's wife, the passenger, became excited and in her attempt to get out opened the throttle, thereby causing an accident which might not otherwise have occurred; Respondent's pilot certificate was suspended for 90 days.[44]

In a case that is cited later as an attempt case,[45] the Respondent, a flight instructor, attempted to "prop" his airplane containing a passenger although the airplane had a self starter and in spite of the fact that other persons were available to assist him. One of the parking brakes, which were set, was defective, and the aircraft turned in a circle knocking down two persons who were standing nearby. This actual violation plus the attempt to operate an aircraft while in an intoxicating condition led to the revocation of the pilot's certificate.

Low Flight

The most common single cause for the imposition of sanctions is flying at an altitude that is too low for the nature of the maneuvers performed or for the locality in or over which the pilot is flying. Cases often involve a combination of violations, as when a pilot not only flies at a low altitude but also while doing so performs acrobatic [46] maneuvers (formerly called aerobatics in the Civil Air Regulations).[47] Of course, low flying in straight and level flight is not as dangerous to persons and property on the surface if not accompanied by the dives,

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[39] Former Civil Air Regulations Section 60.331; present carelessness rule, section 60.102. With regard to the former regulations and violations thereof, see the following cases: *Cline*, 5 CAB 330; *Speight, Id.* 407; *Knauer, Id.* 419,420 (all cases 1942).

[40] *J. D. Kilford*, SR-566 (1943).

[41] *Robert Seick*, SR-1-336 (1949).

[42] *Jean May McFarland*, SR-1377 (1946).

[43] SR-1429 (1945).

[44] *Jean May McFarland*—the pilot's certificate was suspended for three months.

[45] See footnote 84, *Wilburn Glen Allison*, SR-926 (1944).

[46] Section 60.900 of the Civil Air Regulations; section 60.60 as revised Fifth Region, Vol. 14, No. 136, p. 4303, July 16, 1949.

[47] Section 60.9(a) of the Civil Air Regulations effective August 1, 1945.

abrupt pull-ups and steep turns which are associated with what is called a "buzz-job." [48]

The sanction that may be imposed for low flight unaggravated by dangerous maneuvers may be as little as suspension for a period of 30 days [49] or as high as suspension for a period of six months,[50] depending upon the circumstances of the case. The seriousness of violations of the Civil Air Regulations is determined largely by the danger involved in the particular violations, which is the basis for sanction. However, inattention to the details of section 60.107 of the Civil Air Regulations has led some pilots to confuse certain requirements. When pilots think that they can glide to a safe emergency landing, and thereby avoid endangering persons or property on the surface, they sometimes forget that, regardless of their judgment on emergency landings, they must nevertheless maintain the prescribed altitude of 1,000 feet above the highest object within a horizontal radius of 2,000 feet from the aircraft.[51] Similarly, some pilots neglect the requirement that an emergency landing must be made without danger to persons or property on the surface.[52] Respondents have contended that in flights over cities their low altitude was justified by availability of a city park or golf course, whereas in fact such a park or golf course was not shown to be available when regard was given to the safety of persons congregated there.[53]

When dives are made at persons on the surface (or vehicles, vessels or structures) the availability of a site for emergency landing becomes a less crucial factor in the case in view of the unquestionable danger to the person or property at which the pilot has dived. The availability of a safe place for emergency landing still retains its importance as an issue, but such issue becomes secondary in importance to the danger from the dives. Such diving at persons or objects is one of the most dangerous of violations and consequently will usually cause revocation of the pilot's certificate.[54]

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[48] The term "buzzing" by itself can mean low noisy flying and does not necessarily connote the dives and pull ups of "zooming." At hearings in proceedings, examiners require specific evidence of what a pilot has done rather than a conclusionary reference to aeronautical jargon to establish the danger involved in a violation—and hence the appropriate order.

[49] *D. P. Fisher*, SR-988 (1944).

[50] *J. R. Sharkey*, SR-1222 (1945).

[51] *Earnest Joseph Straub*, SR-5-173 (1948); *Edwin S. Alexander*, SR-1-64 (1948).

[52] An emergency will not justify landing within the congested area. *Albert H. Hardin*, SR-2-19 (1947). Nor will the availability of rough country adjacent to the congested area be accepted as sufficient when the pilot in fact would not in emergency land there for fear of killing himself. *John S. Arvidson*, SR-6-183 (1949).

[53] See *Straub* case, footnote second above. Also, it is a violation of section 60.107(b) to fly less than 1,000 feet over an open air assembly of persons. However, 15 or 20 persons waiting for a bus in a rural area are not such an open air assembly of persons. *Charles E. Acey, Jr.*, SR-1-111 (1948).

[54] *Gragian*, 1 CAAR 272 (1939); *Guttermuth*, Id., 661 (1940). See also, bulletins, footnote 61 hereinafter.

Acrobatic Flight

The Civil Air Regulations define acrobatic flight very broadly in order to cover all maneuvers that are potentially dangerous because of the skill required in safe execution, the strain and stress placed upon the aircraft flown, and the possibility of accidents arising from such maneuvers as by a sudden gust of air or unexpected malfunctioning of the aircraft. The maneuvering of an aircraft in an abnormal attitude with an abrupt change of altitude or with abnormal acceleration of speed constitutes acrobatic flight if the performance is done intentionally.[55] Pilots have been held to have been engaging in aerobatics when diving, performing excessively steep turns, or taking off with too great an angle of climb.[56] However, in enforcement of the regulations, the Board distinguishes substantial violations which in fact endanger safety from the more technical violations which arise only because of the broad definition set forth in section 60.900 of the Civil Air Regulations and summarized above.[57]

Pilots are forbidden to perform acrobatic maneuvers in civil airways, over congested areas or open air assemblies of persons, in inadequate visibility (less than 3 miles) or at an altitude less than 1,500 feet.[58] Pilots who carry passengers are under the obligation to provide both themselves and their passenger with parachutes before performing aerobatics. One examiner has pointed out that this regulation [59] serves the purpose of psychologically preparing the passenger for the flight and warning him of potential danger as well as serving the more obvious purpose of providing a means of descent to the ground in the event of structural failure of the aircraft resulting from an acrobatic maneuver.[60]

The relation of aerobatics to the dives and turns that occur in the typical "buzz job" was referred to above in connection with low flight. The number of aircraft accidents which have resulted from such maneuvering by competent pilots, as well as many of poor or mediocre ability, has justified regarding such diving and turning as dangerous within the intent of the provisions of the Civil Air Regulations relating to aerobatics.[61]

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[55] Section 60.9 CAR.

[56] See, for example, *Ferguson*, 5 CAB 76 (1941); *Davidson*, Id. 109 (1941); *cf. Woosley*, Id., 227, 229 (1942).

[57] Sanctions imposed by the Board vary with the danger, as appears from the cases in footnote 56 immediately above. A common sense construction of the section was upheld by the Board in *Henry Herman Koch*, SR-5-373 (1949) where Respondent's aircraft was said to have "swooped down" but the Board found that "the abrupt change in altitude of Respondent's aircraft which the record established does not of itself constitute an acrobatic maneuver."

[58] Section 60.106 CAR.

[59] Section 43.409 CAR.

[60] *Russell M. Simpson*, SR-5-212 (1948).

[61] See "Buzzing . . . Jail Bait," "What Causes Collisions?" Safety Bureau Releases, CAB.

Traffic Pattern Violations

Traffic pattern violations are usually filed in cases of uncontrolled airports, since in the patterns of controlled airports orders from the tower are issued and normally heeded, so that in these cases violations are associated with conditions of inadequate visibility. Pilots occasionally violate a traffic pattern through failure to observe the tetrahedron on the ground at the airport, but occasionally violations occur simply because a pilot is unwilling to take the time and trouble to maneuver with necessary precaution.[62]

The more serious violations arise with regard to take-offs and landings. Even experienced pilots sometimes neglect to protect themselves and others by adequate surveillance of air and taxiing traffic prior to, in, or after take-off or landing.[63] Occasionally, aircraft have overtaken other aircraft on final approach, particularly when a low wing monoplane overtakes a high wing monoplane.[64] Such a result should not occur if the pilots observed the Civil Air Regulations and the local traffic pattern.

Right of Way in the Air

The majority of violations involving right of way in the air or flying too close to another aircraft occur when a pilot decides to make practice gunnery runs or to buzz some other aircraft. Sometimes the offending pilot will only attempt to fly close to, or in formation with another aircraft without the permission of the pilot of the aircraft thus escorted.[65] The potential danger of such maneuvers, particularly the buzzing of another aircraft, is illustrated by the occurrence in which a Navy pilot collided with an Eastern Airlines Transport causing the death of all persons in the transport and himself.

Right of way in the air may be subsidiary to failure to maintain a proper lookout in a safety enforcement proceeding. Thus, although a non-scheduled airline was held responsible in a court for a collision with an Eastern Airlines Transport,[66] the Board nevertheless found that the pilot in command of the Eastern Airlines aircraft had violated the

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[62] See *Thomas R. Murray*, SR-3-103 (1948), an extreme case where diving over a town was also involved. The sanction was in effect revocation with a prohibitory period of a year and 8 months. See also *Wesley Herboldshimer*, SR-5-100 (1947).

[63] *Clarence Newton Van Deventer and William August Latour*, SR-1296, SR-1297 (1946); *Albert Paul Mantz*, SR-6-119 (1949). In the latter case, the famous pilot was exonerated in the examiner's findings. *Pierce P. O'Carroll*, SR-721 (1944), 144 F2d 993 (1944).

[64] See *George A. Van De Sande*, SR-3-138 (1948). However, in this case the Board terminated the proceeding for laches.

[65] Such violation was the principal cause of revocation of Respondent's private pilot certificate in *Henry Herman Koch*, SR-5-373 (1949).

[66] *Eastern Airlines vs. Universal Airlines* D.C. for Dist. of Col. Case No. 130-47, now pending on appeal.

Civil Air Regulations by failure to maintain an adequate lookout personally or by his co-pilot.[67]

Moral Issues

Suspensions or revocations which are not based on one or more of the Civil Air Regulations may be classed as those raising moral issues, although the legal criterion is the requirements of the public interest under section 609 of the Act and the "proper qualifications" of an applicant for a certificate under that section with its implied reference to section 602. Of course, some violations such as the operation of an aircraft while under the influence of intoxicating liquor,[68] could also be regarded as violations indicating a lack of strength of moral character.[69] The classification of certain causes for sanction as moral issues has both historical and practical justification.

Under former regulations, including those promulgated prior to the Act and enforced by the Bureau of Air Commerce, there was a specific regulatory requirement that airmen should be "of good moral character." [70] The requirement had obvious bearings on the public interest other than those concerned only with air safety. One illustration is the anti-social result that would ensue if aircraft were permitted to become instrumentalities for use in criminal enterprises.[71] Criminal use of aircraft has been minimal.

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[67] *Joseph B. Kuhn*, SR-1944 (1949). Nor, according to such decision, may a pilot commit his aircraft to a course which would require affirmative action on the part of the other pilot to avoid a collision. Certain other issues were also raised. Case is pending on appeal.

[68] Prohibited by section 43.406 of the Civil Air Regulations, the violation occurs when the operator of an aircraft has indulged in intoxicating liquor to an extent that renders it unsafe for him to operate an aircraft. *In re Nance*, 5 CAB 201 (1941); see also *James Bruce Warren*, SR-1399 (1946).

[69] The piloting of an aircraft while under the influence of intoxicating liquor provides an illustration of the fluctuation in sanctions imposed by the Board to correct a type of offense. After a period in which the Board followed an order of revocation by prohibitory periods as low or lower than one year, this policy of leniency was called up for reconsideration by a case wherein a commercial pilot appealed from an examiner's decision revoking the pilot's certificate and providing that another certificate might not be issued to the pilot until after expiration of a period of six months. *Stanley H. Woodward*, SR-1-176 (1948). Upon reconsideration of its policy made with benefit of oral argument, the Board reversed the examiner with regard to the prohibitory period and issued an order wherein revocation of the pilot certificate was followed by a further order prohibiting the issuance of any certificate to Respondent for a period of three years. The serious threat to air safety that is caused by piloting an aircraft while intoxicated is now cause for revocation followed by a prohibitory period of two to three years, *ceteris paribus*. See *Robert Valentine Shutter*, SR-1-291 (1949), *George O. Smith*, SR-3-261 (1949).

[70] Such requirement did not extend to the ground instructor rating, Part 23 of the Civil Air Regulations as issued May 1938 under the Air Commerce Act of 1926.

[71] In one proceeding before the Board, a student pilot forged and altered the name of a well known commercial pilot and upon such forgery induced an operator to provide him with a rented aircraft. The pilot used the aircraft in an attempt to evade apprehension as a fugitive from justice. However the attempt was unsuccessful since, at the time of the Board proceeding revoking the Respondent's pilot certificate, he was stated to be an inmate of a State penitentiary. *Samuel Godsey*, SR-1132 (1945).

A discussion of the reasons why criminals do not use aircraft is not appropriate in this article but it seems probable that one big deterrent is the fact that the use of an aircraft increases substantially the likelihood of detection.

Inquiries Into Private Life

In the earlier enforcement of the Civil Air Regulations, the provision requiring good moral character had an unfortunate effect upon enforcement procedures. In suspension and revocation cases, inquiries would be instituted into the private affairs of airmen concerning events that had no relationship to criminal activities or to air safety. Such inquiries were embarrassing to airmen and, in absence of any substantial relationship to the public interest, the prevalence of such basically irrelevant issues in proceedings led to the abandonment of the requirement. An exception to abrogation exists in the case of aircraft and engine mechanics who are still subject to a regulation requiring good moral character. With regard to such excepted airmen, the Board has narrowed the field of inquiry by decision rather than by abrogation of the regulatory requirement. Thus, in the case of *Samuel Bert White,*[72] the Board revoked the Respondent's mechanic certificate for overindulgence in intoxicating liquor while on duty, but stated,

> "We are not unmindful of the fact that facts pertaining to a person's private affairs as distinguished from facts relating to the duties which he undertakes as the holder of a certificate, are matters over which we exercise no jurisdiction." [73]

Further, certain other cases that have been decided by the Board may be read to indicate that charges attacking an airman's good moral character will not be found sustained unless they are supported by clear and convincing evidence.[74]

Another cause for which airman certificates are suspended or revoked although it is not specifically prohibited by any regulation, is obstructing enforcement of safety regulations. In one case a pilot's certifi-

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[72] SR-459 (1943).

[73] See also *Paul A. Soucy,* SR-1-265 (1949), involving the moral character of a mechanic.

[74] The case of *Chester Raymond Dickson,* SR-6088 (1944) involved an allegation of crime that the Respondent had defrauded the Government by filing claim for flight training to trainees for which he had pleaded guilty to an indictment and was fined $8,000. Thus, court records supported the Administrator's charges. However, upon the evidence the examiner found that the Respondent had executed the claim relying upon the statements of others without any intention of defrauding the Government. It appeared that the difficulty lay basically in the Respondent's failure to complete accurate records and that he had in fact given many students more time than was required without charge to the Government or the student. The Board affirmed the examiner and dismissed the complaint. See also and compare the two cases of *Robert A. Nelson,* 5 CAB 372, 452 (1942, 1943) involving question of attempted bribery. In the latter of these the Board found (p. 458) that the Administrator had properly refused to issue the Respondent an instructor's rating and to accept an application for any further test for such rating; but it found further that the evidence did not establish that the Respondent lacked the good moral character required and that such refusal would no longer be justified.

cate was suspended for a period of 6 months because he assaulted an inspector who was engaged in the performance of official duties.[75] In another case, an airman's certificate was suspended for a total period of 90 days because he piloted a former pilot, whose certificate had been revoked, to an airport where the pilot whose license had been revoked assaulted the employee who had reported the violation that had caused revocation.[76]

Moral issues having a direct bearing upon air safety arise in cases where pilots pad their log books or otherwise falsify official records. Such conduct could result in the certification of an unqualified applicant for a rating[77] or render inaccurate aircraft and engine log books upon which inspections are based.[78]

A number of cases arise from dishonesty in official examinations. The pilot certificates held by applicants taking an examination for a higher rating have been revoked for such conduct.[79] In other incidents, the violation has not been as severe and only a suspension has been ordered.[80]

Pilot certificates have been revoked as a result of the pilot's alteration or forgery of certificates.[81] In another case[82] a person falsely represented himself to be a private pilot when he was in fact a student pilot. The case involved other violations but which were not discussed with regard to separable sanction. The circumstances proved in the case indicate that the sanction which was imposed upon all the violations was greater because of this false misrepresentation.

Use of Fundamental Principles

The Board's files also include records of other cases interesting for their reliance on fundamental principles not included in the Civil Air Regulations. Action has been taken by the Board against certificates of airmen who have not complied with Board orders.[83] In one case,

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[75] *Herbert M. Peters*, 5 CAB 478 (1943).

[76] *James Owen Brooks*, SR-929 (1945). The total 90 day suspension consisted of an emergency suspension of 60 days followed by a further suspension for 30 days.

[77] See *Gerald Kenneth Halverson*, SR-999 (1945) and *G. P. Beyer*, SR-882 (1944). Certificates were revoked in each case. See also *Francis X. March*, SR-1129 (1945) and *L. J. Marcucelli*, SR-590 (1943). In these cases the pilot certificates were suspended.

[78] See *Primo*, 5 CAB 72 (1941) involving suspension of an air agency operator's private pilot certificate for a period of 60 days, and *Betzoldt*, 5 CAB 166 (1941) involving what was in effect a suspension of a private pilot's certificate for 120 days.

[79] *Hassen Ali Easmeil*, SR-1056 (1945); *G. A. Graham*, SR-631 (1943); *H. T. Logar*, SR-848, and *C. W. Poston*, SR-725 (both 1944); *John Stanley Steber*, SR-1394 (1946).

[80] *Joseph Franklin Shileds*, SR-1-172 (1948) and *Jack Kenneth Brown*, SR-4-79 (1948); *Harro Maxfrederick Wild*, SR-2-265 (1949).

[81] *Donald Tait Speirs*, SR-1242 (1945); *Samuel Godsey*, SR-1132 (1945). Such conduct also justifies proceeding for a criminal fine or imprisonment, or both, under 902(b) of the Act.

[82] *Weyman Gordon McDaniel*, SR-1318 (1945).

[83] See *Lewis Wilson McNutt*, SR-1010 (1945); *John Warren Tapp*, SR-6-76 (1949).

action was taken against a pilot certificate on the ground that its holder made a serious attempt to violate Civil Air Regulations, preparing to take off while in an intoxicated condition, but being persuaded at the last moment not to fly the airplane.[84] In another proceeding, a student pilot certificate was suspended because the student induced another student pilot to carry him as a passenger contrary to regulations.[85]

Although all of these cases may be grouped under the heading of moral offenses and thus under a term which is broader than usual concepts of regulation, it will be readily apparent that each cause for sanction stands upon well settled principles of law that are traditional in other branches of jurisprudence and that each has an intimate relation to the enforcement of air safety.

Statutory Authority for Safety Enforcement

The Board's authority for action in safety enforcement cases is contained in sections 602 (b) [86] and 609[87] of the Act.[88] The greater part of such action by the Board is undertaken under section 609. For the Board's authority to act in emergencies to protect the public safety

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[84] *Wilburn Glen Allison*, SR-926 (1944).

[85] *Wilbert C. Land*, SR-1248 (1946).

[86] Subsection (a) of Section 602 provides for the issuance of airman certificates specifying the capacity in which the holders are authorized to serve as airmen, and subsection (c) provides for the form and recording of such certificates. Subsection (b) contains, following the text quoted hereinafter, a proviso relating to the issuance of certificates to aliens which is here deleted as irrelevant to this article. With such deletion, and giving parenthetical effect to Reorganization Plan No. III, 53 Stat. 561, 5 USC 133 *seq.*, subsection (b) reads as follows: "Any person may file with the Authority (Administrator) an application for an airman certificate. If the Authority (Administrator) finds, after investigation, that such person possesses proper qualification for, and is physically able to perform the duties pertaining to, the position for which the airman certificate is sought, it shall issue such certificate, containing such terms, conditions, and limitations as to duration thereof, periodic or special examinations, tests of physical fitness, and other matters as the Authority (Board and Administrator) may determine to be necessary to assure safety in air commerce. Any person whose application for the issuance or renewal of an airman certificate is denied may file with the Authority (Board) a petition for reconsideration, and the Authority (Board) shall thereupon assign such application for hearing at a place convenient to the applicant's place of residence or employment . . ."

[87] 52 Stat. 1011, 49 U.S.C. 559. "The Authority (Administrator or Board) may, from time to time, reinspect any aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, may re-examine any airman, and, after investigation, and upon notice and hearing, (the Board) may alter, amend, modify, or suspend, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate, or air agency certificate if the interest of the public so requires, or may revoke, in whole or in part, any such certificate for any cause which, at the time of revocation, would justify the Authority (Administrator, as determined by the Board) in refusing to issue to the holder of such certificate a like certificate. In cases of emergency, any such certificate may be suspended, in whole or in part, for a period not in excess of thirty days, without regard to any requirement as to notice and hearing. The Authority (Administrator) shall immediately give notice of such suspension to the holder of such certificate and (the Administrator and the Board) shall enter upon a hearing which shall be disposed of as speedily as possible. During the pendency of the proceeding the Authority (Administrator) may further suspend such certificate, in whole or in part, for an additional period not in excess of thirty days."

[88] The effect given parenthetically to Reorganization Plan III in the footnotes above is a *prima facie* construction made upon its terms. Complete judicial or administrative construction does not appear in decided cases.

as distinguished from the Administrator's authority, reference is made to section 1007 of the Act.

Power to Issue Certificate

As may be observed from the text, Section 602 (b) of the Act provides that any person whose application for the issuance or renewal of an airman certificate is denied by the Administrator may file with the Board a petition for reconsideration, and the Board shall thereupon assign such application for hearing at a place convenient to the applicant's place of residence or employment. At first glance, and because section 602 authorizes the issuance of airmen certificates, it would appear that the provision for review of a denial is not related to enforcement but solely to the competency of the applicant. The relevance to an applicant's conduct turns upon the interpretation of the words "properly qualified," whether the words refer only to ability to perform the skills and duties of an airman rating or have a broader significance. The broader application and relation of this section to enforcement was established in an early case which has been uniformly followed, *Bruce L. Dunbar.*[89]

In that case Dunbar's application for private pilot certificate was denied by the Administrator for lack of proper qualifications, and Dunbar filed a petition for reconsideration under the terms of section 602 (b) of the Act. Following a public hearing, the examiner found that Dunbar had an extended record of violations of the laws of Massachusetts and New Hampshire, particularly motor vehicle laws, and that while Dunbar displayed greater than average technical skill in the piloting of the aircraft, his tendency to violate the laws dealing with the operation of motor vehicles was reflected in his operation of aircraft; and for these reasons the examiner found that Dunbar was not qualified to hold a private pilot certificate. The Board, without relying solely on the motor vehicle violations, found that the described tendencies of Dunbar's were "becoming evident in his operation of aircraft." The Board denied the petition and, in effect, sustained the examiner on the ground that Dunbar lacked mature judgment, had a tendency toward recklessness, lacked respect for laws designed for the protection of the public and had an attitude of defiance toward those whose duty it was to enforce these laws.

Interpreting "Properly Qualified"

The broad meaning of the words "properly qualified" that is implied by the holding in the Dunbar case is probably required by the form of section 609 which makes revocation of an airman's certificate depend upon finding a cause which would, had it occurred at the time of application, have justified refusal to issue a like certificate. Serious violation of the Civil Air Regulations can undoubtedly constitute such

[89] *Bruce L. Dunbar*, SR-3-2, 1 C.A.A. 525 (1940).

cause. Moreover, one of the objectives of the Act is "The regulation of air commerce so as to best promote its development and safety."[90] Section 1005 (e) of the Act requires "every person subject to this Act . . . to observe and comply with any order, rule, regulation, or certificate issued by the Authority under this Act . . ." and in section 610 (a) of the Act, subsections (1) through (4) contain reference to certain certificates and their terms with the provision in subsection (5) that it shall be unlawful, — "For any person to operate aircraft in air commerce in violation of any other rule, regulation, or certificates of the Authority under this title." Thus, construction of the Act as a whole requires the interpretation given to "properly qualified."

Anticipating Hazards

In the case of *Wallis*,[91] the complaint alleged certain violations that had been committed by a student pilot, prior to issuance, and unknown to the Board or Administrator at the time of the issuance of his certificate. He contended that he was not engaged in air commerce at the time of the violations and challenged the Board's jurisdiction over the matters alleged in the complaint. In arriving at the conclusion that the Board had authority to take action notwithstanding the defense raised and also regardless of whether the acts were done while he was directly engaged in air commerce the Board stated, "It is far more important that the Civil Aeronautics Board anticipate and prevent the creation of hazards to air commerce than it is to take remedial and punitive steps after losses of life and property have actually occurred in the channels of air commerce."

With respect to the particular acts which occurred prior to the time that he held an airman certificate, the Board states that if he at that time had held an airman certificate, proceedings might have been commenced to revoke that certificate. Further, the Board stated, "Also, had the acts of the Respondent, as specified in these paragraphs, come to the attention of the Administrator of Civil Aeronautics before Respondent's student pilot certificate was issued, such certificate would undoubtedly have been denied. That the student pilot certificate was issued to the Respondent on August 14, 1940, is no bar to the present proceeding, since for the first time the acts complained of have come to the attention of the Administrator and the Board."

Nance Case Changes

The *Dunbar* and *Wallis* cases show early policy that continues. Section 602 (b) also still implicitly operates, in those proceedings wherein

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[90] Section 2 (e) of the Act, 52 Stat. 980, 49 USC 402. The public interest is defined by reference to Section 2 of the Act. *American Airlines, Inc., et. al.*— 1 CAAR 480, 483 (1939). The public interest is the basis for suspensions under section 609, as appears hereinafter.

[91] SR-61, 5 CAB 87 (1941).

a revocation of an airman certificate is ordered.[92] Formerly, airmen certificates expired by their terms in given periods of time, and the Administrator[93] would refuse reissuance or issuance of a certificate of another rating for reason that the applicant had been reported to have violated the Civil Air Regulations.[94] This practice was changed after the case of *Nance*.[95] Therein such denial and review led to a lapse of over 3 months wherein a pilot was deprived of his commercial pilot certificate pending issuance of a decision by an examiner and approximately 4 months pending decision by the Board. The Board therein found that the violations required suspension for a period in excess of 4 months. However, the deprivation of a certificate to him could have been regarded as inconsistent with those provisions of section 609 which limit emergency suspensions to a period totalling 60 days. Possible collision of such practice with the policy of the Act is particularly apparent when further attention is directed to section 3 of the Act providing, "There is hereby recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit in air commerce through the navigable air space of the United States." After the decision in the *Nance* case, airmen certificates were made continuing in duration.[96]

Prohibitory Period

When revocation of a pilot's certificate is ordered, the Board now provides as part of the order the period of time wherein another certificate may not be issued to the offender.[97] This practice accords with the spirit of the Act in that it avoids the delay possibly incident to requiring revoked pilots to bring proceedings under section 602 (b) for issuance of another pilot certificate. In the revocation proceeding, the Administrator recommends a prohibitory period indicating that in his opinion the violation or violations of the pilot require such a prohibition for air safety and that a certificate would not be issued sooner. The Respondent may contend for a shorter period before the examiner, or

[92] Such analysis has not been confirmed by the Board, although it was the basis of an examiner's decision which became final as an order of the Board in absence of appeal. *John Warren Tapp*, SR-5-364 (1949).

[93] The Administrator was under the authority of the Board (Authority) until Reorganization Plan No. III became effective June 30, 1940. Thereafter, the Civil Aeronautics Administration under the Administrator and the Board functioned separately.

[94] *Alexander*, 5 CAB 15 (1940). In this case a complaint was filed with the Board by the Administrator while Respondent still held a valid certificate, but the certificate expired prior to hearing. Thereafter, Respondent brought the case before the Board to review the Administrator's denial of a certificate. (For explanation of the procedure in this case, further reference should be made to other decisions.) The Board subsequently held, in effect, that it loses jurisdiction in a suspension or revocation proceeding upon expiration of the airman certificate. *Gardner*, 5 CAB 86 (1941); Knapp, Id. 215 (1942). Thus, expiration of the certificate of Alexander required an alteration of procedure.

[95] 5 CAB 201 (1941).

[96] Sec. 20.51(b) C.A.R.

[97] Under former practice, the Civil Air Regulations prohibited the issuance of a certificate for a period of one year after revocation. These regulations were abrogated upon the basis of Board experience that one year was insufficient as a sanction to protect air safety in some cases and too long in others.

on appeal from the examiner's decision before the Board. Decision on the period's duration makes a subsequent proceeding by the pilot under section 602 (b) unnecessary. It obviously is more convenient to airmen than indecision with regard to issuance of a new certificate and, possibly, the necessity of participating in a second proceeding involving, to a substantial extent, the same facts.

This practice of in effect combining revocation proceedings under section 609 with anticipatory proceedings under 602 (b) was instituted prior to the enactment of the Administrative Procedure Act, but it is in the spirit of the last sentence of section 9 (b) of the Act. That sentence provides,

> "In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been fully determined by the agency."

The present practice assumes application by the airman for a new certificate, and such assumption appears to be justified by Board experience.[98]

Efficiency of Procedure

Although the Board does not require a formal application from the pilot for renewal or a new certificate, and for reasons of public safety could probably refuse to anticipate a proceeding under section 602 (b) in a proper case,[99] the present practice of interpolating anticipatory proceedings under section 602 (b) into revocation cases is a measure of efficiency and a substantial convenience to airmen. When the circumstances of an airman change, subsequent to a final order, Board practice permits his filing a petition for reconsideration of the order.[100] Section 1005 (a) and (d) of the Act permits the Board to retain control over its orders and thus prevents orders under section 602 (b), from operating with hardship that could not be anticipated at the time of decision.

Section 602 (b) is not applicable to all safety certificates. The Board has determined that it has no authority to review the Administrator's action in denying an applicant for an air agency certificate, *Ernest E. Boyer*.[101] The Board's decision in this case was rested in part

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[98] It is only in exceptional cases that a pilot is willing to sacrifice his right to fly. Occasionally a pilot who has had a violation accident fatal to a relative or friend has indicated that he does not desire to fly again, and in a few cases pilots have decided permanently to cease flying for financial reasons.

[99] The Attorney General's Manual on the Administrative Procedure Act (p. 91) regards other provisions of section 9 (b) as inapplicable to airmen certificates for reason of the public safety, specifically the provision for what the Manual refers to as "another chance."

[100] See, for example, *Fred Girod*, SR-857 (1945); *William P. Rayburn*, SR-4-188 (1949). Similar relief for respondents has also been granted on petitions filed by the Administrator. *Herbert Seabourne*, SR-2-128 (1948).

[101] *Ernest E. Boyer*, SR-342, 5 C.A.B. 311 (1942).

upon Reorganization Plans Numbers III and IV, but it would appear that the case need not be rested upon these two plans but may rest solely upon the Act itself. The authority to review the denial by the Administrator of an applicant is specifically covered in section 602 and is confined to airmen certificates.[102] One possibly might question the merits or logic of preferring all airman certificates, which include mechanics and technician certificates, above air agency or other safety certificates with regard to this particular protection.[103] However, it seems clear enough that by including this right of appeal to the Board with respect to airman certificates and omitting any mention of other safety certificates, the legislative intent to give such right solely to airmen is established.

Amendment, Suspension and Revocation of Certificates

The greater part of the Board's safety enforcement action is undertaken under the provisions of section 609 of the Act.[104] Few points that are distinctly referrable to the wording of the section have been raised. However, it should be noted that the criterion for the suspension of certificates is the requirement of the public interest, rather than violation of the Act or the Civil Air Regulations.[105] Thus, in the absence of such a violation, it would appear the public interest may require suspension of an airman certificate, and the Board has so interpreted the Act. The terms of section 609 of the Act may also be noted for the provision that upon issues of revocation, the Board shall determine the causes which will justify the Administrator in refusal to issue a safety certificate.

Civil Penalties

Under an interpretation of Reorganization Plans Numbers III and IV by the Attorney General[106] it was concluded that the Administrator had complete authority over the compromise of civil penalties and that the Board's authority was confined to taking action with respect to various safety certificates. While this interpretation is arguable in law

[102] The term "airman" was defined broadly under Section 9(k) of the Air Commerce Act of 1926, "The term 'airman' means any individual (including the person in command and any pilot, mechanic, or member of the crew) who engages in the navigation of aircraft while under way, and any individual who is in charge of the inspection, overhauling, or repairing of aircraft or of parachutes. (As amended by the Act of June 19, 1934, 48 Stat. 1113.)" In the 1938 Act, Section 1(6) rephrases this definition and includes also aircraft dispatchers and air-traffic-control operators.

[103] Reason for preference to pilots may be found in the public policy of freedom of air transit quoted above from Section 3 of the Act.

[104] The relevant terms of section 609 are set forth above in footnote 87.

[105] As hereinabove stated, under section 610(a) of the Act, the violation of the terms of any safety certificate or the violation of any other rule or regulation promulgated by the Board under Title VI (containing the safety provisions of the Act) is also "unlawful" and hence a violation of the Act itself. Under the predecessor Air Commerce Act of 1926, section 3(f), the criterion for suspension or revocation was the violation of regulations promulgated under that Act.

[106] Attorney General opinion May 2, 1940 contained in letter to Director of the Bureau of the Budget confirming the Director's interpretation of Reorganization Plans III and IV.

and may also be regarded as unfortunate on the basis of the results that have followed,[107] it is an accomplished fact. Through the cooperation between the Board and the Administrator results fair to the parties have been achieved in some instances. In the *Herbert M. Peters case,*[108] the Board found that a pilot had violated certain Civil Air Regulations but dismissed the case, "without prejudice to reopening the case on motion of the Administrator if Respondent fails to pay on or before July 24, 1942 a civil penalty of $50.00 assessed against him." In another case, *Joel Eck,*[109] the Board dismissed the proceedings revoking a student pilot's certificate for carrying a passenger, on the ground that the pilot had paid to the Administrator a civil penalty of $500.00, which the Administrator had accepted. The Board may institute safety enforcement proceedings by order to show cause through its Bureau of Law even when the Administrator does not choose to institute a proceeding upon a complaint,[110] and the imposition and compromise of a civil penalty for a violation does not preclude simultaneous action for suspension or revocation of the airman's certificate.[111] However, even when the violation involves both an operating certificate and the pilot's certificate, a compromise of a civil penalty in the case of the operating certificate will be considered in mitigation in the issuance of an order for suspension or revocation of the pilot's airman certificate.[112]

Severity of Sanctions

Upon comparison of sanctions imposed on holders of different airman ratings, the Board follows a policy of considering the effect of an order on the individual. It imposes sanctions of shorter duration on those who earn their livelihood by use of a certificate than on those who utilize certificates only for pleasure. Comparatively short periods of suspension of the certificates of airline pilots or aircraft and engine mechanics bear heavier upon the holders than substantial suspension, or even revocations would bear upon some pleasure flyers. Similarly, flight instructors and commercial pilots may be severely disciplined by an order which would be nominal in its application to the average student or private pilot. So also, a short period of suspension will affect

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[107] The separability of the imposition and compromise of civil penalties from proceedings for suspension and revocation is one aspect of the separation of unified control which has been criticized by impartial official investigators of present enforcement of air safety. See SURVIVAL IN THE AIR AGE, pp. 50-51. Rec. 89, p. 52 (1948). Senate Report No. 949, 80th Cong., 2nd Sess., Rec. No. 84, pp. 50-51, Rec. 89, p. 52 (1948). See also Final Report of the Attorney General's Committee on Administrative Procedure, p. 175 (1941).

[108] See *Peters,* 5 CAB 346 (1942); also *Roy Tant Hutchison,* SR-4-32 (1948); *Cyrus Thompson Willock,* SR-919 (1944).

[109] SR-K-24 (1946).

[110] *James W. Wilson,* SR-1276 (1945).

[111] In *Raymond L. Schillig,* SR-1081 (1944) the Board on its own motion issued an order to show cause why the Respondent's pilot certificate should not be suspended or revoked although the Administrator had compromised a civil penalty in the amount of $25.00. Therein, the Respondent had permitted a student pilot to carry a passenger in Respondent's aircraft as then contrary to section 20.726 of the Civil Air Regulations; Respondent himself was the passenger carried.

[112] *John B. Bethel,* SR-5-265 (1949).

a pilot who uses an aircraft in his business with as much force as substantially longer periods would affect persons flying only for pleasure.

Since the Board's action is remedial rather than penal, personal factors are often considered in decreasing the severity of a sanction in particular cases. The Board's sanction policy admits consideration of the results of a violation which in itself disciplines the individual, as where a pilot realizes that his violation has caused the loss of a personally owned aircraft in a crash or the payment of a substantial amount for its repair. Injuries to pilots, hospital expenses and other physical or financial damage is sometimes reason for decreasing what would otherwise have been the duration of a sanction.[113] Action by States in punishing pilots for violations is considered.[114] The individual's attitude towards the Civil Air Regulations, his past record, his maturity or high value as a pilot to his community can occasionally afford reason for the imposition of a lesser sanction.[115] Prior violations are considered and result in more severe sanctions. The enumerated factors are usually reflected in the recommendation of sanction made by the Administrator's safety agents and attorneys, but when recommendations do not reflect consideration of proper items, those items may also be considered in the formulation of orders by examiners and the Board because the Board is not limited to the sanctions recommended by the Administrator but may impose more severe sanctions.[116]

Deferring Sanctions

The Board has often been requested to make a period of suspension or revocation begin at a future date later than the date when it would normally begin under usual Board practice. Present practice does not permit such a deferring of the effective date of an order.[117]

Denials are made although the respondents have claimed a necessitous use for aircraft or other appealing reasons in requesting the deferments. In past periods of the Board's practice, the effective dates of orders were occasionally deferred upon request, particularly during the war period and for reasons bearing directly or indirectly upon the national defense. In *William Leonard Morse,*[118] a pilot's services were needed for the U. S. forestry service. In the case of *Thomas Guy Brown,*[119] a doctor's patients required services which necessitated his transportation by his own aircraft; however, subject to the deferment, the Board revoked the doctor's certificate noting that his reason for not studying the Civil Air Regulations was that they were too dry. In

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[113] *Freddie Dorman York,* SR-1426 (1946).
[114] *Manuel M. Franco,* SR-1-322 (1949).
[115] *John B. Bethel,* SR-5-265 (1949); *Earl Jusken Allen,* SR-41 (1945).
[116] *Eugene Thomas Skowieczny,* SR-1033 (1944); *Charles Edward Zunker, Harold William Vedder,* SR-1040, 1041 (1945).
[117] *John D. Rockefeller,* SR-1-258 (1949), *William Dale Crane,* SR-5-283 (1948), *Francis Leon Barber,* SR-3-384 (1949), *Thomas A. Hellender,* SR-3-401 (1949).
[118] SR-1028 (1945).
[119] SR-914 (1944).

the case of *Alvin Earl Young,*[120] a pilot was similarly permitted a deference due to the food emergency in his agricultural region where farmers depended upon his services and contact with the city to obtain parts for tractors and to perform other services for farming. In the case of *Orin R. Alexander,*[121] a suspension of pilot certificate was granted to assist an employer in the prevention of forest fires.

From the discussion above, it must appear that a regulatory policy has developed which is more analogous to equitable doctrines than to legal formalism which would disregard personal and causatively material facts to achieve a mechanical uniformity. The Board in effect forecast this development as early as 1939 in the case of *Ingalls.*[122]

In that case it appeared that a well know pilot of long experience and high competency showed "disturbing deficiencies in her knowledge of the current provisions of the Civil Air Regulations." Acting in ignorance of regulations and under claim of right, the pilot was proved to have flown over a restricted area of Washington, D.C.[123] and dropped pamphlets to further her efforts as a representative of the Women's National Committee to Keep United States Out of War.[124] In her testimony, the pilot declared dependency upon her pilot certificate for her livelihood, although she then held a rating insufficient for such use of it.[125] The Board, with regard to her experience and competency stated,

> "All pilots must exercise an extremely high standard of care in the operation of aircraft, must have a thorough knowledge of the pertinent parts of the Civil Air Regulations, and must carefully observe them if the maximum safety in air navigation is to be achieved. However, to accomplish this purpose, we must expect even more of the pilots of long experience who have had thousands of hours of solo flying time, for they provide guidance and instruction for those of more limited experience."

In discussing the appropriate order, it stated:

> "Our purpose in proceedings of this character is to take such action with respect to individual airmen as will promote safety in air navigation."

Her pilot certificate was not revoked but was suspended until she should, upon written examination, demonstrate thorough familiarity with certain pertinent parts of the Civil Air Regulations. The same basic individualized approach to air safety proceedings is still utilized.

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[120] SR-1150 (1945).

[121] SR-1549 (1946).

[122] 1 CAAR 512 (1939).

[123] Prohibited pursuant to terms of Sec. 4 of the Air Commerce Act. The Board held such terms superior to the general terms of Section 3 of the Civil Aeronautics Act granting freedom of transit in air commerce.

[124] Section 60.347 CAR then prohibited the dropping of objects from aircraft with certain exceptions immaterial to the case.

[125] Section 20.611 CAR then prohibited pilots of solo pilot rating, which she held, from piloting aircraft for hire.

INTERNATIONAL

Department Editor: Joan H. Stacy*

INTERNATIONAL CIVIL AVIATION ORGANIZATION (ICAO)

I. Introduction

ON the fifth anniversary of the Convention on International Civil Aviation,[1] ICAO, the organization which it founded, was well on the road toward achievement of its objectives. ICAO has formulated international standards and recommended practices in nine different fields of air navigation—personnel licensing, rules of the air, meteorological codes, aeronautical charts, dimensional units in air-ground communications, operation of scheduled aircraft, aircraft nationality and registration marks, airworthiness and aeronautical telecommunications. These ICAO standards and practices already adopted represent the majority of the technical fields where the Convention says worldwide uniformity is needed for the safety, regularity and efficiency of international air transport. ICAO, through the holding of a series of regional air navigation meetings throughout the world, has made a complete survey of requirements for international air navigation facilities and services and established operating procedures necessary to meet conditions peculiar to the various regions. In accordance with the provisions of Chapter XV of the Convention, ICAO has arranged for joint international financing by user nations of essential air navigation services in Iceland, Greenland and the Faroe Islands and has sponsored the North Atlantic Ocean Stations Program.

In the field of air transport, ICAO has taken a long step toward simplifying international border-crossing procedures and documents through the adoption of standards and recommended practices for the facilitation of international air transport. The Organization is becoming successful in the collection of statistics, which may prove helpful in solving such problems as user charges for air navigation facilities. It is studying methods for differentiating between scheduled and non-scheduled air services. ICAO has proven a valuable forum for exploration of the possibility of concluding a multilateral agreement for the exchange of commercial rights in international air transport. Thus far, ICAO's outstanding accomplishment in the field of air law has been the opening for signature of the Convention on International Recognition of Rights in Aircraft, which will protect mortgage interests in aircraft flying along international routes and facilitate aircraft sales abroad. ICAO has a membership of fifty-six nations.[2]

II. Eighth Session of the Council

One of the outstanding conclusions reached by the ICAO Council during its eighth session, which ended on December 13, 1949, was the decision that no amendments should be made to the Convention on International Civil Aviation at the fourth annual assembly of the Organization.[3] The Netherlands

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[1] The Convention on International Civil Aviation was drawn up at the International Civil Aviation Conference held at Chicago November 1-December 7, 1944.

[2] Syria became the fifty-sixth member of ICAO on January 20, 1950.

[3] The Fourth ICAO Assembly will convene in Montreal on May 30, 1950.

was prepared to support amendment of Article 45 on the permanent site of the Organization and Article 52 on voting in the Council, and the United Kingdom pressed for changes in Article 94, the article on method of amending the Convention. Belgium and Switzerland took the attitude that there should be no amendments to the Convention until a general revision could be made. Majority sentiment, led by the United States and France, developed in favor of the following action, which was taken on November 29, 1949:

The Council decided

(1) that it would not recommend any amendments to the 1950 Assembly, reporting to the Assembly on the reasons which had led it to this decision;
(2) that it would recommend that the 1950 Assembly should not adopt any amendments to the Convention, giving reasons for this recommendation; and
(3) that it would proceed to study the whole problem of amendment with a view to reporting to the 1950 Assembly on the principles, methods and procedures for the amendment of the Convention.

The next step that the Council will have to take will be to decide on a solution to the problem of how the Convention should be amended in future years.

Another action by the eighth session of the Council was the tentative adoption, after consideration of the recommendations of the Air Navigation Commission and the Air Transport and Joint Support Committees, of a provisional agenda for the Fourth Assembly. This agenda, in addition to procedural and administrative matters, includes the following items:

Plenary Items

Election of Contracting States to be represented on the Council and obligations of Council Member States (Article 49(b) of the Convention).
Policy and program with respect to the amendment of the Convention (Resolution A2-5).

Other Items

Technical assistance for economic development.
Review of the Structure of ICAO: the Council, its Commissions, Committees and Divisions (Resolutions A1-7 and A2-8).
General review of the work of the Organization in the technical field.
Commercial Rights in International Air Transport (Articles 5 and 6 of the Convention and Assembly Resolutions A2-18 and A2-19).
Further action to secure a Multilateral Agreement on Commercial Rights in International Air Transport (Resolution A2-16).
Joint Ownership and Operation of International Air Services on Trunk Routes (Resolution A2-13).
Obstacles encountered in the implementation of Annex 9—"Standards and Recommended Practices for the Facilitation of International Air Transport."
Statistical Programme of the Organization.
Other business arising out of the Report of the Council on the progress of work in the economic field.
Any business arising out of the review of the Report of the Council on the progress of work in the legal field.

Final action by the Council on the agenda was planned by February 1950.

Following endorsement by the United Nations General Assembly of the August 15, 1949 resolution of the Economic and Social Council on an ex-

panded technical assistance program, the ICAO Council formally accepted the observations and guiding principles set forth in the resolution. The ICAO Council also approved the recommendation of its Joint Support Committee that a communication be sent to all ICAO Member States, requesting their views on the role that ICAO should play in the UN program, outlining certain types of projects which ICAO might undertake and inquiring whether the Member States planned to request technical assistance from the Organization.

Air Navigation Matters

During the fall of 1949 the Air Navigation Commission completed a review of the major principles in the draft Standards and Recommended Practices for Aerodromes and Ground Aids (AGA). When the Secretariat attempted to incorporate proposals made by the fourth session of the AGA Division [4] into the draft standards and it appeared that this long-awaited annex to the Chicago Convention might thus be further delayed, the Commission directed the Secretariat to prepare two separate working papers—one reflecting the Commission's discussions on the draft annex and one the findings of the fourth session of the AGA Division.

Another controversial annex, one which would establish international standards for accident investigation, was approved by the Air Navigation Commission for dispatch to Contracting States for comment by February 28, 1950. The Commission completed its review of the Manual of Aircraft Accident Investigation,[5] and the Council authorized its publication as a guide for ICAO Member States.

The Council's approval was obtained for amendments to Annex 4 to the Convention, Standards and Recommended Practices for Aeronautical Charts. Contracting States have until June 1, 1950 to file any disapproval of the amendments, which will come into force on September 1950 unless disapproved by a majority of the States. The Commission approved for submission to the Council amendments to Annex 2, Standards and Recommended Practices for Rules of the Air, and completed substantially its review of amendments to Annex 1, Standards and Recommended Practices for Personnel Licensing.

The Air Navigation Commission and the Council approved the agenda for the Second Caribbean Regional Air Navigation Meeting, to be convened on April 11, 1950 at a site not yet determined. The Commission, in the hope of doing away with the practice of convening fact-finding groups about a week before each regional air navigation meeting, directed the Secretariat to tabulate all available information on facilities, services and operations in the Caribbean Region. States have been asked to correct and complete this tabulation by February 15, 1950. If the response of States is satisfactory, both the Organization and Member States will be saved the expense of the fact-finding group.

The Commission approved the recommendations of the second session of the International Administrative Aeronautical Radio Conference (IAARC) of the International Telecommunication Union (ITU) concerning utilization of frequency channels in the aeronautical mobile "R" service, and both the Commission and the Council approved the following schedule of regional frequency assignment planning meetings:

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[4] The fourth session of the Aerodromes, Air Routes and Ground Aids Division, held in Montreal from November 1 to December 2, 1949, was on the subject of aerodrome lighting problems.

[5] ICAO Doc. 6920-AN/855.

	Date	*Site*
Caribbean-South American-South Atlantic Region	April 11, 1950	Site of Caribbean Regional Meeting
African-Indian Ocean and Middle East Region	March 21, 1950	Paris
South East Asia Region	March-April 1950	Undecided

The Commission, after discussing a plan proposed by the United States for the utilization of VHF for international air-ground services in the Western Hemisphere, decided to submit it to States for comment to determine whether it had general support throughout the hemisphere.

Air Transport Matters

Following extensive work in the Air Transport Committee during the fall of 1949 on multiple taxation of air transport, the Council approved the Committee's recommendation that three draft resolutions and a questionnaire on the subject be circulated to Contracting States for comment by March 1, 1950:

(1) A draft resolution recommending that ICAO Member States exempt, on a reciprocal basis, from all customs and other duties, the fuel, lubricants and other technical supplies taken on board a foreign aircraft for consumption during flights to another customs territory.
(2) A questionnaire to determine whether or not it is generally feasible to extend exemption from customs duties to fuels, lubricants and other technical supplies consumed between two or more landing points within the same customs territory.
(3) A draft resolution recommending that each ICAO Member State, to the fullest extent possible, grant reciprocally to air transport enterprises of other Member States exemption from taxation on income and gross receipts derived from international air transport; also exemption from property taxes, capital levies and other similar taxes on aircraft engaged in international air transportation. Inclusion of such exemptions in bilateral agreements dealing with taxation in general or with the exchange of commercial air transport rights and legislation granting such exemptions are recommended.[6] (The Air Transport Committee had decided not to consider further the possibility of a multilateral agreement on income and property taxation of airlines and had agreed that the resolution approach alone was feasible.)
(4) A draft resolution recommending that each ICAO Member State eliminate, or reduce to the fullest extent possible, taxes on the sale or use of international air transportation.

The Council adopted the Committee's recommendation that no action be taken by ICAO with respect to income and social security taxes imposed on employees of air transport enterprises as these taxes affect all international businesses and at the present time do not appear to constitute a serious problem in the field of aviation. The Council also accepted the Committee's recommendation that no action be taken with respect to customs duties and excise taxes on the ground equipment and supplies of international air trans-

[6] ICAO Doc. 6929, LGB/26 of December 2, 1949, International Tax Agreements, List No. 1, General Agreements with Specific Reference to Air Transport, summarizes bilateral agreements concluded both before and after World War II. Many of these agreements, which are in general applicable to income from shipping as well as aircraft, provide for income taxation by the country in which the place of management of the concern is located and exempt the concern from taxation by the second country. In general, countries which tax income are also entitled to tax property.

port enterprises pending study of Member States' replies on the Facilitation Annex.[7]

In the final stages of its fall 1949 discussion of the problem of multiple taxation, the Air Transport Committee had the benefit of advice from members of the United Nations (UN) Secretariat, as a result of which further coordination of ICAO's work with that of UN on broader tax questions appeared desirable. Pending replies from ICAO Member States on the draft resolutions and questionnaire, the two secretariats will work together to expand and analyze the background data on international taxation so that it will be available to the Air Transport Committee and the Council before they take final action on the tax resolutions.

The Air Transport Committee devoted several meetings during the fall of 1949 to preliminary discussions of the policies to be followed in assessing user charges for airports and other navigation facilities. A working group will use these discussions as the basis for drawing up policy proposals to be examined by the Committee early in 1950.

The Committee directed the Secretariat to prepare a new paper on nationality of aircraft operated by international operating agencies, which would cover all the legal, economic, and administrative aspects and deal with the problem both from the point of view of (1) possible national registration of such aircraft and (2) possible international registration. The Committee agreed to recommend to the Council that no further action be taken on the matter of Contracting States' obligations under Article 21 of the Chicago Convention to supply the Organization with data on aircraft registrations. ICAO Air Transport Reporting Form T5 already provides for reporting of data on aircraft registration.

Before adjourning for its winter recess, the Air Transport Committee approved a statistical program for the guidance of the Secretariat during the next six months. Under this program, ICAO will publish eight statistical summaries a year and issue certain supplementary statistical information on a monthly basis.

III. General

The fifth session of the ICAO Legal Committee was convened at Taormina, Sicily on January 5, 1950. A report on this session, which was focused on the Rome Convention for the Unification of Certain Rules Relating to Damages Caused by Aircraft to Third Parties on the Surface, will be included in the next issue of the JOURNAL.

The third ICAO trainee program, which will extend over a five months' period beginning February 20, 1950, will provide six nationals of ICAO Member States with general instruction on the air navigation, air transport and legal work of ICAO or specialized study in one particular phase of the Organization's activities.

The Second North Atlantic Ocean Stations Agreement came into force on January 13, 1950 following its acceptance by the United States and the United Kingdom, States which together are responsible for operating eighteen out of the twenty-four ocean station vessels.

JOAN H. STACY

[7] Standards and Recommended Practices for Facilitation of International Air Transport, recommendation 4.5 provides that "ground equipment and technical supplies imported into a Contracting State for use within the limits of an airport by an airline of another Contracting State in connection with the establishment or maintenance of an international air service of such airline, should be admitted free of customs duty, subject to compliance with the regulations of the Contracting State concerned; such regulations should not reasonably interfere with the necessary use in such service of such ground equipment and technical supplies."

INTERNATIONAL AIR TRANSPORT ASSOCIATION (IATA)

IATA Traffic Conferences

THE world airline fare and rate structure laboriously erected by the IATA Traffic Conferences over the past four years was subjected to a severe test by the devaluation of the pound sterling on September 18, 1949. That structure was a carefully adjusted pattern of inter-related charges for service over thousands of route segments and, with the consent or approval of governments, it has been extended to cover the Atlantic, the Pacific, Europe, Africa, the Middle East and large parts of Asia.

The keystone of the whole rate pattern was the fact that the U.S. dollar was equal to five shillings in British sterling. Even though the world was divided into hard and soft currency areas, all other currencies maintained a reasonably stable relationship to these two and both costs and charges could be equated in them.

The change in this basic relationship by the 30 per cent devaluation of the pound cracked the rate structure down the center and the partial devaluation of other currencies caused other discrepancies. For a few hours, it was even impossible for international airlines operating in more than one currency area to sell tickets.

Fortunately, the basic IATA Traffic Conference resolutions had set up procedures for meetings to cope with possible devaluations. The pattern was temporarily cemented together within the week following September 18 by conferences in London and Paris which set up a new series of interim and necessarily approximate relationships between the various currencies.

These arrangements could, however, be only incomplete and temporary. Due to devaluation, costs of materials and services varied largely from one country to another. Many airlines collecting their revenues in devaluated currencies were still required to pay at least some of their costs in dollars. On routes operated in pool or in parallel by hard and soft currency airlines, one or the other was forced to take either a heavy cut in necessary revenue, or boost the price of transport far beyond the reach of its own nationals.

The regularly scheduled composite meetings of all three IATA Traffic Conferences at Mexico City in November provided the first opportunity for formal review and recalculation of the rate structure. Their task, which occupied three weeks, was to reconcile the widely separated positions into which devaluation had forced many of the airlines. For airlines in devaluated countries, a five pound fare represented as much of an expenditure as it did before September 18, regardless of the new relationship to the dollar. In addition, the lower scale of dollar equivalents gave them a point of attraction to dollar traffic which was, basically, the reason why their governments had devaluated and which they would not be allowed to sacrifice completely.

Hard currency airlines operating into soft currency countries, on the other hand, were still required to pay the bulk of their costs in dollars. If they were to cut their rates to the level of the devaluated currencies their revenues would have been pushed down into the economic danger zone.

The rate and fare structure finally recommended by the Mexico City Conferences to interested governments and effective, with their approval, on February 15 or sooner, represents a basic compromise between the currencies, taking into consideration all related traffic and economic matters.

It was agreed that, in general, rates for North and South America and the routes across the Atlantic and Pacific to gateways into Europe, Africa and Australasia are based on dollars. In the areas between the two great

oceans—the Eastern Hemisphere—sterling continues to be the basis of fares and rates.

Dollar area rates, as over the Atlantic, remain unchanged except for small decreases. In the sterling area, some rate increases were found to be necessary because certain operating costs—notably fuel and spares—must still be paid in U.S. dollars.

This means that in the sterling area, rates have been decreased about 20 per cent in terms of hard currency and have gone up about ten per cent in terms of soft currency. Fares for journeys over routes lying partly in dollar territory and partly in the sterling area are combined: thus, the fare for a trip from New York to Prague is calculated in terms of dollars to the European gateway and in terms of sterling from there to Prague.

The result of this arrangement is to keep airline rates in the sterling area as low as possible, so that inhabitants of the devaluated currency countries can get as much air transport as possible for their own money, and so that travel dollars from the Americas will be attracted by lower transport costs in the rest of the world.

At the same time, it was also found possible to extend the rate structure by bringing into it fares and rates between five South American countries—Argentina, Brazil, Chile, Paraguay and Uruguay.

The Mexico City Conferences also devoted considerable attention to special rate projects designed to encourage traffic over certain routes, particularly in the off-seasons. The most important of these off-season arrangements is a drastic reduction in winter round-trip rates across the Atlantic from North America to Europe, designed to test the historic seasonal downward trend of traffic on the North Atlantic. Limited to the first ten weeks of 1950, this experiment has brought the round-trip rate over the Atlantic to one and one-tenth the normal one-way fare for a 15-day round trip excursion. On the basis of the normal $350 one way fare, from New York to London, the round-trip excursion rate became only $385.

Among other special fares established are off-season excursions from South America to Europe; from Australia and New Zealand to Singapore and Rome; special round trip reductions within Europe for conducted, all-expense tours arranged by travel agents, etc.

The Conferences also approved a large number of resolutions having to do with conditions of carriage, traffic documents and the like. Particular concessions were made to travellers having large amounts of luggage.

IATA Technical Committee

A concerted attempt by IATA member airlines to coordinate existing navigation aids and air traffic control systems and to cooperate in planning for future needs is now under way on the basis of plans approved by the IATA Technical Committee at Dublin during December, 1949. Special and immediate attention will be given to air traffic control conditions in the Europe-Mediterranean area.

Member airlines are assigning experts to study navigation and traffic control problems in three groups:

IATA Flight Technical (FT) Group—to determine operational requirements for radio aids and all-over air navigation services now being used and for those which will be set up in future;

IATA Radio Aids (RA) Group—to map out technical characteristics of radio navigation aids and communications systems to meet these operational needs;

IATA Europe-Mediterranean Air Traffic Control (EUMED ATC) Panel —to examine traffic control services and standards provided and planned in

that area, to recommend coordination and remedies for deficiencies, where they are found, and to deal with local problems at individual airports.

All three groups will cooperate with the appropriate divisions of ICAO, individual governments and such special groups as the U.S. Radio Technical Commission for Aeronautics.

The Technical Committee agreed that strong IATA technical delegations will continue to assist at sessions of ICAO and the International Tele-communications Union which during 1950 will assign frequencies for aeronautical use in various regions. It was pointed out that the results of the ITU Administrative Radio Conferences in 1949, at which IATA experts assisted, had been satisfactory to the airlines; and that the ITU Administrative Telegraph and Telephone Conference had agreed to arrangements for sharing of airline leased circuits and the refiling by public telegraph of messages sent over leased teleprinter circuits.

The Technical Committee also commissioned a study of "duty time" requirements for flight crews, concentrating on operational demands before and after actual flight, to supplement investigations into flight fatigue being carried on by the IATA Medical Panel.

Customs free airports—which are international zones for airline transit operations as well as for trade purposes—were endorsed by the Technical Committee as most desirable from the operational point of view after a discussion of Shannon Airport, which is customs free.

A NEW APPROACH TO THE ROME CONVENTION ON DAMAGE TO THIRD PARTIES ON THE SURFACE

IN preparation for the Fifth Session of the ICAO Legal Committee at Taormina, Sicily in January, a new approach to the problems of the Rome Convention dealing with damage to third parties on the surface was circulated among the legal experts in the United States who were then working on the revision of the present Convention. The new draft sets forth a list of defenses that are to be universally recognized, allowing each country's underlying standard of liability (absolute or based on fault) to remain in force and proposes a system for discharging the operator from his liabilities upon the deposit of certain amounts with the forum in which the claims are to be presented. The text is set forth below.

1. This Convention shall apply to all claims for damages arising out of death, injury, or damage caused to persons or property while on the surface of a Contracting State by an airborne aircraft registered in another Contracting State.

2. Subject to the provisions of this Convention, all liability in connection with claims mentioned in Article 1 shall be governed by the law of the Contracting State in force where the injury or damage took place.

3. Each Contracting State undertakes to create a procedure whereby any person who may be held liable under the laws of such state in connection with a claim mentioned in Article 1 may petition a court in such state for the determination of all liabilities arising out of the occurrence concerned and for the adjudication of all claims involved. The right to file such a petition may, however, be conditioned upon the filing of a bond, guaranty, or other showing that all proved claims in the proceeding will be met, not exceeding in the aggregate the applicable amount indicated in Article 4 of this Convention. In such event a statement by an insurance company authorized to do business in the Contracting State of the aircraft's registry that liability insurance in such amount was in force at the time of the occurrence

and that funds in the currency of the forum are available for the payment of proved claims up to such amount shall be deemed sufficient for this purpose.

4. In proceedings brought pursuant to Article 3, the total liability, together with court costs and other allowable expenses shall not exceed in the aggregate the amount indicated below opposite the weight classification of the aircraft causing the damage:

Under 12,500 lbs.	$ 150,000
Over 12,500 lbs.	1,500,000

5. In the event that the total claims proved in a proceeding brought pursuant to Article 3, together with court costs and other allowable expenses therein assessed against the party or parties to be charged exceed the appropriate limit set forth in Article 4, the priority in which such claims shall be paid or the manner in which they shall be reduced shall be determined by the law of the forum. In the absence of such law, all claims shall be reduced proportionately after payment of court costs and other allowed expenses.

6. In proceedings brought pursuant to Article 3, each person charged with liability shall have at least the following defenses with respect to each claim:

(a) The damage arose through claimant's negligence
(b) The damage arose through an act of God
(c) The damage arose through *force majeure*
(d) The damage arose through the wrongful act of a third party
(e) The damage arose from some other cause and was not contributed to by the negligence of the party to be charged, his servants, or agents.
(f) The damage arose from a cause not involving physical contact of the aircraft concerned or any part thereof with the surface.

In the event that the party to be charged shall affirmatively prove any one or more of the foregoing defenses in the proceeding, he shall be adjudged free from liability with respect to all claims to which the defense is applicable. In no event shall any claim be allowed in excess of the damage actually proved.

7. The filing of a petition pursuant to the procedure referred to in Article 3 shall constitute without further showing, in all Contracting States, absolute grounds for staying all other nations predicated upon the same occurrence, and responsibilities which may theretofore or thereafter be brought against any party to be charged in the proceeding. Such stay shall continue in effect until the proceeding is finally adjudicated. Thereafter proof of satisfaction of the judgment in accordance with its terms shall constitute a bar to recovery in any such other action.

8. As used in this Convention the expression:

(a) "Airborne" means that period of time extending from the instant that an aircraft commences to take-off through the application of take-off power to the instant that it either comes to a stop or power is again applied for the purpose of moving on the surface.
(b) Surface of a Contracting State means all land and water areas for the foreign relations of which a Contracting State is responsible and includes vessels and aircraft of its nationality on the high seas.
(c) "Aircraft" means all aircraft excepting military, customs and police aircraft.

FEDERAL

Department Editor: Charles T. Lloyd*

ERNST & ERNST REPORT COVERING PRELIMINARY STUDY OF METHODS OF COMPENSATION FOR CARRIAGE OF DOMESTIC AIR MAIL AND FOR THE OPERATION OF AIR TRANSPORTATION SERVICE ESSENTIAL TO THE PUBLIC INTEREST†

IN accordance with the directive of Senator Edwin C. Johnson, Chairman, Committee on Interstate and Foreign Commerce, we have made a "pilot study" of the problems attendant upon compensation of the certificated domestic air carriers engaged in the carriage of mail within the borders of the United States.

The intent of the Civil Aeronautics Act of 1938, as Amended, with respect to compensation to be paid carriers, was defined by the Civil Aeronautics Board in American Airlines, 3 C. A. B. 323, 335, (1942), in which the Board stated—

> "The 'compensation' to be paid to the carriers in the air mail rate is not merely compensation for the transportation of mail. The use of the mail payments is a statutory device for the accomplishment of national objectives that transcend the interests of the Postal Service. These objectives, expressly stated in the Act, encompass the maintenance and continued development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense. The compensation which the carrier receives thus becomes compensation not only for carrying the mail but for the building up of a system of air transportation which will serve the nation's commerce and security as well."

The purpose of the study was to advise the Committee as to the need (1) for the formulation of a consistent and understandable air mail rate structure and (2) for devising a method by which payments to the carriers by the Government could be identified as compensation for the carriage of air mail and as compensation for those other services contemplated by the Act.

During the progress of the study, conferences were held with operating and financial executives of a majority of the certificated domestic air carriers. Personnel of Government agencies concerned in the carriage of air mail, have made available their time in discussion of the problems involved. Members of the professional staff of your Committee have contributed to this study and extended their full cooperation.

Field studies in connection with the handling and dispatch of air mail were conducted at selected major airports.[1]

A brief summary of conclusions and recommendations follows:

1. Segregation of compensatory air mail pay from the total payments to the carriers by the Government will not of itself lessen the current need of the carriers nor provide the primary means of reducing total expense to

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* Executive Secretariat, Department of State.

† Submitted by Ernst & Ernst, Accountants and Auditors, New York, N. Y.

[1] List of 11 carriers and 5 government agencies interviewed during this study is omitted.

the Government, unless accompanied by a mail rate structure which affords an incentive to the carriers and a means of determining auxiliary payments which cover efficient operation on routes held to be essential in the public interest.

2. Fair and reasonable rates, uniformly applied, for the transportation of mail by aircraft, should bear a definite relationship to the rates applicable to passenger transportation service which has aggregated more than 80% of the revenue ton-miles flown during the past eight years. Mail rates established in this manner would thus be consistent with the rates established for 80% of the volume, would at least provide the same incentive inherent in the other rates and would serve to eliminate the need for attempting to separate operating costs between those applicable to air mail transportation and other services. The greater portion of operating costs are joint costs applicable to all services and it should be recognized that a specific cost separation between those applicable to transportation of mail and other services is impractical.

3. The amounts of auxiliary payments for services other than the carriage of mail, and held to be in the public or national interest, should be based upon the operating effectiveness and specific requirements of the individual carriers. Such auxiliary payments could be paid from specific funds so appropriated and not be a part of the operating budget of the Post Office Department. Auxiliary payments which are predicated upon a budgeted efficient operating program applicable to the operating conditions incurred, rather than on actual historical results of operations, will serve to eliminate payments for inefficient operations and provide an additional incentive to the carriers.

4. Basic standard data should be developed which will make possible the budgeted operating costs of each individual carrier in order that equitable auxiliary payments can be provided for when the individual carrier under efficient operation cannot operate at a reasonable profit. Composite industry standards cannot be used for purposes of judging the relative efficiency of the individual carriers because of the many and constantly changing variables inherent in the operations of the various carriers.

5. The present domestic route pattern should be studied with the view toward possible elimination or consolidation of certain route segments which were certificated during the rapid growth of the industry and which may have brought about excessive competition, thus resulting in larger payments by the Government than are warranted to cover the cost of services held to be essential in the public interest. In any revision of the domestic route pattern which may call for elimination or absorption of routes or segments of routes by other carriers, it would seem that protection could be afforded the owners of such assets as may be involved. Thus, in place of continuing auxiliary payments indefinitely to cover services which are determined to be no longer warranted in the public interest or national defense, a final settlement representing the loss on disposal of operating assets would be an economical move.

6. Certain changes in the Civil Aeronautics Act of 1938, as Amended, would be necessary to permit the application of the foregoing conclusions.

In the following section, the requirements for a basic rate structure and auxiliary payments have been outlined and a method for their formulation has been proposed. Also the need for establishing standards and what may be accomplished from their use has been pointed out. It is recommended that this pilot study be followed by the detailed analysis required

to permit the implementation of the conclusions and proposals set forth in this report. The objectives capable of attainment by the fulfillment of this program and the resultant benefits include the following:

1. A consistent and understandable system for compensating the air carriers can be substituted for the diverse and complex methods which are now a burden to both carriers and Government agencies.

2. Development and use of proper standards will not only provide all concerned with an accurate means for measuring operating efficiency, but will furnish the carriers with an invaluable aid to management.

3. By use of such standards, the carriers will be enabled to forecast and measure their accomplishment with greater accuracy. By this method, the "need" of the carriers may be equitably determined.

4. Auxiliary payments (for services other than the carriage of mail) to the carriers will be identified from compensation for the carriage of mail, thus making it possible to relieve the Post Office Department of responsibility for budget and payment of funds not related to its activity.

5. Through such identification, attention will be concentrated upon operating methods and procedures and a constant incentive provided toward increased efficiency.

DISCUSSION

Compensation for Carriage of Mail

After giving consideration to the various factors affecting the cost of transporting mail by aircraft, it is believed that a rate structure used in compensating carriers for such service should consist of the following:

1. A fixed element to cover the handling and terminal costs necessary for and incident to the loading, handling, and unloading of mail.
2. A variable element to compensate carriers for the air transportation of mail, based upon a direct relationship to the passenger rate structure.
3. The above to be subject to a minimum poundage for each designated flight with gradual step increases for increased poundage, coupled with a provision for the control of designated flights.

By having a fixed element in the rate structure to cover costs incident to handling mail at terminal points, recognition is given to the cost of making service available and to situations where terminal costs are a relatively high proportion of the the total costs incurred in connection with short hauls.

The introduction of a basic mail rate covering both the handling and transportation of mail, used in conjunction with a minimum designated weight of mail per trip and step increases for use in compensating carriers for poundage over the minimum, gives recognition to the high degree of fixed cost to which carriers are subjected in making service available. Further, such a method will recognize the fact that carriers must maintain staffs and facilities of adequate strength to successfully handle fluctuating volumes of mail.

These provisions in the rate structure will place added responsibility on the Post Office Department in selection of designated flights and in forecasting anticipated volume.

The use of minimum charges and step increases is generally universal in rate structures of utility companies and in pricing industrial commodities.

It is found in postal rates, electric light and power rates, gas and water rates, surface transportation freight rates and Pullman fares. It is believed that this principle is equally applicable in the settling of rates for purposes of compensating carriers for transportation of mail by aircraft.

In establishing a fixed element of cost to cover the handling of mail, a series of studies would have to be made at the various terminals. These studies would employ accepted methods of motion and time analysis. Such studies would not only provide an allowance for the handling of mail but would also serve to establish uniform methods and procedures. It is contemplated that proper allowances will be made in cases when ground personnel encounter unavoidable lost time by reason of the irregularity of schedules or because of other such valid circumstances.

The basic rates designed to compensate for the carriage of air mail should bear a relationship to the passenger fare for the following reasons:

1. The passenger rates represent amounts that the public is paying for a measured amount of service.
2. The passenger rates represent the selling price of the industry's major source of revenue. The percentage of mail ton-miles to total ton-miles for the years 1946, 1947 and 1948 has approximated only 5% for each of these years.
3. A direct relationship of this kind is easily understood by the public.

In stating that the mail rate and passenger fare structures should be related, it is contemplated that the passenger fare will be used as a starting point, to which necessary adjustments will be made for such expense items as pertain to the direct handling of passengers. Either first class passage or coach rates can be used as the starting point, as long as the proper adjustments in the reconciliation are made and higher minimums and larger step increments are recognized to correspond with higher anticipated load factors in the coach rate structure.

When the adjusted rate has been established, it would be applied to a predetermined quantity of mail on routes and flights designated by the Post Office Department. In effect, a minimum space or quantity would be established for which the carrier would be guaranteed minimum compensation for the carriage of mail. To simplify computation of compensation, units of space or quantity should be established in even increments.

It must be recognized that a uniform relatively simple compensatory rate structure that bears a reasonable relationship to the passenger rate structure (that covers 80% of the total revenues), coupled with an equitable means of determining auxiliary payments when the total revenues are inadequate to cover efficient essential operations, is far more practicable than to attempt specific cost separations or over-all allocations of a joint operation which in the end can only be accomplished by many disputable arbitrary assumptions.

In support of our contention that a specific cost separation between those applicable to transportation of mail and other services is impractical, we submit the following:

The Board, in a show-cause order, used a method of cost allocation to establish a mail rate in which costs applicable to services performed jointly were allocated on the basis of the ratio of mail ton-miles carried to total payload ton-miles.

Some carriers as well have employed this ton-mile formula in an attempt to determine the cost of transportation of mail by aircraft, but the Board

itself acknowledges the method's shortcomings when it states, in an Eastern Airline rate case (Docket No. 3021)—"a straight proration of joint costs between services regardless of relative volume will unduly burden those services constituting the larger volume and will relieve the small volume service of a portion of those minimum fixed costs necessary to provide any service." The relationship of cost and volume of the various services are expected to be ever-changing from day to day, and the ton-mile allocation method does not give proper recognition of the fixed costs associated with making the service available.

As an illustration of the inaccuracy resulting from the allocating of costs under the ton-miles flown formula, assume that the normal available payload of a flight is 3,000 pounds. Of this amount, assume the space reservation for expected mail load to be the equivalent of 200 pounds. For this planned operation 1/15th of the flying costs could reasonably be allocated to transportation of mail. However, under actual conditions, assume that the total payload is only 2,000 pounds, of which 250 pounds are mail. Under these conditions, and, as exemplified by use of the ton-mile formula, the costs allocable to transportation of mail would be ⅛th of the total cost. It is obvious that there only can be considerable question as to the equity of the results obtained.

Auxiliary Payments

The above section outlined the recommended basis for computing compensation for transportation of mail. The following paragraphs outline the recommended method for determining auxiliary payments when the total revenues are inadequate to cover efficient operation of a carrier which is deemed essential in the public interests.

As mentioned in the Act, Section 406(b) provides that in fixing and determining fair and reasonable rates of compensation for transportation of mail by aircraft, the Board shall take into consideration the need of each carrier for the purpose of enabling such carrier under honest, economical and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense.

While the Act contemplated that carriers would be reimbursed for losses of the above nature, it did not contemplate reimbursement for avoidable losses resulting from management inefficiency. In the administration of the Act, the Board, therefore has a responsibility to detect such inefficiency and to withhold payments for losses incurred thereby. Auxiliary payments for services other than the carriage of mail, therefore, should be based on the individual carrier's operating performance. A later section of this report outlines the standard cost and revenue accounting techniques recommended for use by all carriers as an aid in achieving efficiency. Any auxiliary payments should be based on the accomplishment shown by the carrier in meeting the standard "Total Cost of Operations" as reported on the "Quarterly Report of Operations" (Exhibit A). Auxiliary payments when warranted for services other than the carriage and handling of mail should be based on the difference between actual revenue for the quarter and the total "Standard Cost of Operations" (Exhibit A), at the volume experienced for the period. In this manner, an incentive is provided to keep actual expenditures within the limits of standard expenditures related to the available ton-miles actually flown.

In order to eliminate the possibility of inflating the total standard cost, it would be necessary to adjust the standard cost for any excessive, uneconomical flying as indicated by the "Load Factor Variance" on the "Analysis of Variance from Standard Revenue" described later in this report. Thus, if a carrier's actual flight hours in a quarter exceeded his budgeted flight hours and the load factor did not maintain the proper relationship to the hours flown, his auxiliary payment would be affected thereby.

The above method of payment would not, however, exclude payment on an actual reimbursement basis for unusual and unavoidable expenses.

Standard Cost and Revenue Accounting Development of Operating Cost Standards

At the present time the Board is handicapped in accurately evaluating the operating efficiency of the carriers. In the Board's answer to an inquiry during the recent Senate Committee hearings, regarding the feasibility of using objective cost standards, the following statement was made:

> "The Board regards the development of more objective cost standards as necessary both to the discharge of its obligations to establish fair and reasonable compensation for the carrier of mail, under honest, economical and efficient management and its obligation to foster and develop a sound healthy and efficient Air Transport Industry in the interests of commerce and the national defense. Accurate cost standards would not only provide the Board but also management and the investors, with essential tools with which to judge and evaluate the carrier's performance. The Board regards the development of cost standards as a necessary prerequisite to the attainment of efficient operations and the ultimate realization of a status of self-sufficiency.
>
> "Some two years ago a small cost analysis group was established in the Accounting and Rates Division. Around this nucleus we hope to develop a body of specialists in the several areas of air transport operations who, through their experience in analyzing the operating costs of all air carriers, will be in a position to construct cost yardsticks for each cost area and set up attainable standards adapted to the operating peculiarities of each route."

It is apparent from this statement that the Board recognizes the need for development and establishment of objective cost standards, but the Board has been required to continue to use historical or reported costs in the absence of these desired objective cost standards.

Under this procedure, the Board relies upon historical costs to provide valid standards for comparative purposes. This procedure is questionable as the effect of any and all past unidentified inefficiencies are carried forward as a part of the yardstick which is used in comparing current and projected costs in rate-making proceedings. Also, under this procedure, it is difficult to detect warranted increases in costs which are beyond the control of the carrier.

In order to provide the proper means of measuring effectiveness, it will be necessary to establish separate "Operating Yardsticks" for each carrier, taking into account specific conditions of fleet make-up, route and schedule patterns and conditions, etc., for each carrier and to evaluate the efficiency of each carrier's operation in terms of performance against the standard established in the light of its own set of operating conditions. Thus, a carrier reporting a 95% performance against standard would be operating more efficiently than one reporting 80% *even though the standard of the former be higher by reason of different operating conditions beyond the control of the carrier.* For example, the standard maintenance and flight operation costs

per flight hour of a specific aircraft type would be greater for a carrier averaging 100 miles between scheduled stops than for one averaging 500 miles between scheduled stops.

A typical example of measuring operating performance in a specific function follows:

The standard man-hours representing the amount of work required to recondition an engine type can be determined through motion and time study techniques. When such techniques have been applied to the various operations required in the overhaul of each type engine, the result can be expressed as standard man-hours per each type of engine. It follows that when the total engine maintenance production in a given period is multiplied by the earned hours per each type of engine and compared with the total actual man-hours consumed, the degree of effectiveness is reflected.

Use of Cost Performance Reports

Under standard cost and revenue accounting, the monthly and quarterly financial reports take the form shown in Exhibit A. With standards realistically established for each individual carrier, the percentage of performance

ILLUSTRATION (ACTUAL SIZE 8½" x 11") QUARTERLY REPORT OF OPERATIONS (PROPOSED)

EXHIBIT A

	AMOUNT - PERIOD			YEAR TO DATE		
	STANDARD	ACTUAL	VARIANCE	STANDARD	ACTUAL	VARIANCE
REVENUE						
OPERATING EXPENSES						
FLIGHT OPERATIONS						
ADMINISTRATIVE						
FLIGHT ADMINISTRATION						
PILOTS AND CO. PILOTS						
RADIO OFFICERS						
FLIGHT ENGINEERS						
FLIGHT SERVICE						
PASSENGER SERVICE						
COMMUNICATIONS						
TRAINING SECTION						
AIRCRAFT RENTALS						
SUB TOTALS						
STATIONS OPERATIONS						
MAIN BASE MAINTENANCE						
SALES						
ADMINISTRATION						
ADVERTISING						
SUB TOTALS						
ADMINISTRATION						
EXECUTIVE						
MANAGEMENT ENGINEERING						
ACCOUNTING						
SUPPLY						
AIRWAYS						
PERSONNEL						
MEDICAL						
SUB TOTALS						
TOTAL OPERATING EXPENSES						
TOTAL COST OF OPERATIONS						
PER CENT PERFORMANCE						
NET COST OF OPERATIONS						
NET OPERATING PROFIT						

(Exhibit A) thus provides a quantitative measure of the operational efficiency of the carrier.

In addition to the "Quarterly Report of Operations" (Exhibit A) standard cost accounting would provide detailed analyses of the variances isolated to show in which departments variances arose and the major causes of the variances . . .[2]

It is impracticable to include, in this brief study, the detailed procedures which would be followed in the development of Earned Hour standards or reasonable time allowances for all of the other functions in the industry. The above example deals only with one function. In all other departments, the same general approach would be used with suitable units of measurements of performance.

Standard Revenue and Variance Analysis

In addition to operating cost standards, standards of performance should also be established to measure the efficiency and economy of the various revenue producing departments, sections, routes, aircraft types, etc. Variances from standard revenue would be most helpful in planning schedules and flights, and in high-lighting those areas where corrective action or additional sales effort should be applied.

Revenue standards would be established taking into account the actual conditions under which the carrier must operate. For example, in one area, a load factor of 75% and aircraft utilization of 8.0 hours per day might be taken as standard for purposes of arriving at the budgeted passenger revenue per flight hour while, in another area, it may be necessary to take a load factor of 40% and a utilization of 5.0 hours per day. Budgeted revenue for each aircraft type would be established by budgeting anticipated passenger, cargo and air mail revenue based on realistic load factors and scheduled aircraft utilization expressing the anticipated dollar revenue per flight hour.

ISSUES INVOLVED IN A UNITED AND COORDINATED FEDERAL PROGRAM FOR TRANSPORTATION—ANALYSIS OF THE SAWYER TRANSPORTATION REPORT*

THE principal specific recommendations contained in the report on "Issues Involved in a United and Coordinated Federal Program for Transportation," submitted December 1, 1949 to the President of the United States by the Secretary of Commerce, Charles Sawyer, are here briefly summarized. In order that the nature of such recommendations as contained in the Sawyer report may be clearly indicated, it is necessary to note the particular circumstances under which this report was prepared and transmitted.

The report was made pursuant to a request from the President dated August 30, 1949, which referred to the need for "a unified and coordinated

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[2] The remaining detailed portions of the Report dealing with "variance analysis for use in main base maintenance" are omitted. Reference is made to several detailed Exhibit reports which cannot be readily reproduced.

* Prepared by Burton N. Behling, Senior Specialist, Transportation, Legislative Reference Service, Library of Congress, for Mr. Edward R. Jelsma, Professional Member, Surface Transportation Subcommittee, U.S. Senate Committee on Interstate and Foreign Commerce.

Federal program for transportation" and "as a first step" called for "a report outlining the major policy issues which need to be resolved at this time." Secretary Sawyer in responding to this request undertook to provide "something more than . . . a list of alternatives" and outlined the issues "around a framework of policy."

The result of this approach, and of the further fact that the report was in preparation over a rather short period, is that in most respects it does not purport to give "recommendations" of a final or definite character but instead offers various tentative suggestions or conclusions as a basis for further study and consideration. Such reservations are emphasized generally at this point in lieu of repeated qualifying statements in the following references to particular proposals.

The report considers and makes suggestions regarding both "promotional" and "regulatory" activities of the Federal Government, as summarized under those headings below. Where pertinent, references also are made in this memorandum to (1) similar proposals made in other prior reports on transportation and (2) bills on the same subject matter which were introduced during the first session of the 81st Congress.

Promotional Activities

After reviewing the "bewildering array" of Federal promotional activities in the transport field (p. 45), the "major conclusion" of the report is that there is an "absence of any over-all promotional program" and that these activities "have now reached such scope as to warrant critical re-examination . . . to indicate whether the various promotional programs are in harmony and whether the Federal Government is obtaining adequate return for the expenditures it is making." (p. 46)

The report finds that conflicts, excesses and inconsistencies arise principally from these "significant facts": (p. 23)

1. In almost every case a promotional agency is responsible for providing only a single type of facility useful for only one form of transportation.

2. The promoting agencies have for the most part only very broad and general standards established for them by statute.

3. Each promotional agency has been the judge of the merits of its own promotional activities.

4. In several important cases the basic transport facilities are provided without charge, making it difficult to measure the utility of the separate programs in terms of the willingness of users to pay for the use of the facility.

5. There has been little coordination between the various facility programs, each program being carried on with little or no regard to the others.

On the basis of these findings the report advances as its major proposals that—

1. A centralized Federal agency to coordinate transport promotional (as distinguished from regulatory) activities be established, and

2. A system of user charges be imposed, where not now applicable, to cover the cost of transport facilities and aids provided from public funds.

Certain other proposals relating specifically to highways, ocean shipping and air carriers also are suggested, as noted subsequently.

Proposal of a Centralized Promotional Agency

To effectuate the proposed coordination and balancing of promotional activities, the report suggests "the grouping of all major promotional activities under unified direction and control," including therewith "the establishment of a permanent centralized research staff with a clear mandate to evaluate and appraise all of the various promotional activities . . . and make recommendations for a coherent and balanced program." It is stated that such a central agency "would be in a position to make a unified evaluation of the total needs of transportation, the total service provided, and the results of all Federal promotional and regulatory activities." The Sawyer report is silent as to where such an agency should be placed in the structure of the Federal Government. (p. 47)

Various proposals of this nature for a centralized and permanent transport agency have been made from time to time in the past. Most recently, the Hoover Commission on the Organization of the Executive Branch of the Government recommended that such a coordinated transport agency (excluding regulatory bodies) be established within the Department of Commerce.[1] Some of the other reports which have found a need for coordination of transport promotional activities have recommended the creation of a separate Department of Transportation at cabinet level, or of an "independent" Transport Authority to be set up on either a temporary or permanent basis.[2] S. 126 (81st Cong., 1st sess.) and earlier like bills reflect the recommendations made in 1944 by the defunct Board of Investigation and Research for the establishment of a Federal Transportation Authority as an "independent executive agency."

Proposal on Highway Policy

The report suggests that "more attention should be given to striking an appropriate balance between Federal, state, and local activities in the highway field." (p. 17) In this connection it is noted that the Federal Aid Highway Acts of 1944 and 1948 extended the Federal aid road systems to include not only a 40,000-mile interstate trunk system but nearly 600,000 additional miles of highway, "much of which might be considered of secondary importance from a national standpoint and primarily of concern to state and local areas." (pp. 15-18) As further evidence of the need of reconsideration, the report also points out that the "Bureau of Public Roads now favors enlarging the Federal contribution beyond 50 percent on the basic 40 thousand-mile trunkline system." (p. 16)

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[1] A significant exception in this report, however, is that the river and harbor development functions now performed by the Army Corps of Engineers would be consolidated with the Reclamation Service within the Department of the Interior. Commission on Organization of the Executive Branch of the Government, *Concluding Report* to the Congress, May 1949.

[2] See for example, the following: C. L. Dearing and W. Owen (The Brookings Institution), *National Transportation Policy*, 1949; Board of Investigation and Research, *Practices and Procedures of Governmental Control*, 1944; National Resources Planning Board, *Summary Report of Transportation and National Policy*, 1942; Reports of the Committee of Six and the Committee of Three to the President of the U.S., 1938; Third Report of the Federal Coordinator of Transportation, H. Doc. 89, 74th Cong., 1st sess., 1935; and Fourth Report of the Federal Coordinator of Transportation, H. Doc. 394, 74th Cong., 2nd Sess., 1936.

Recommendation of User Charges for Public Facilities

A major feature of the Sawyer report is its endorsement of a general system of user charges to pay for transportation facilities and services provided from public funds. (pp. 24, 48, 102-106, 108-109). Recognizing that transportation subsidies result in unequal competitive conditions as between different kinds of transportation, as well as in uneconomic allocation of traffic, the report concludes that "the Federal Government should undertake to study and receive the issue of assessing user charges as speedily as possible," where such charges are not now imposed or are inadequate. (p. 24)

In support of this recommendation the report also emphasizes that a general system of user charges would—

1. Provide concrete evidence of the actual value of the various aids which were being supplied, thus affording a basis for particular emphasis on such developments as transport users are willing to support and at the same time giving "the most convincing demonstration that the services and facilities provided are actually in the public interest." (pp. 24, 28)

2. Tend to place all forms of transport on a more equitable basis and make it possible for regulatory agencies and carriers to remove distortions in rate structures caused by transport subsidies. (pp. 105, 108)

The report also suggests that exceptions to the principle of user payments should be made only (1) on the basis of a clear finding by those directly concerned with the country's defense that the services to be subsidized are clearly essential from a defense standpoint and could not be obtained or maintained without Government support, in which event "such subsidies might be charged to the military budget," or (2) where the "need to accelerate the development of particular services or areas may temporarily justify the furnishing of facilities at Government expense." (pp. 24, 108)

Over a period of years similar recommendations for the general applicability of user charges have been made as a result of comprehensive investigations of the extent and effects of transport subsidies. Among these the following may be particularly noted:

1. Report of the Federal Coordinator of Transportation (Joseph B. Eastman) "Public Aids of Transportation," 1940.

2. Report prepared for the Board of Investigation and Research on "Public Aids to Domestic Transportation," transmitted to the Congress and printed as H.Doc. 159, 79th Cong., 1st sess., 1944.

3. C. L. Dearing and W. Owen (The Brookings Institution), "National Transportation Policy," 1949. Based in part on a study of federal transportation activities undertaken at the request of the Hoover Commission.

Proposal for Eliminating Subsidy from Air-Mail Payments

The report recommends, as a "step on which there is general agreement," that any payment of subsidies to air carriers, both domestic and overseas, should henceforth be separate from compensation for air-mail service. (pp. 34-41, 48-49) Similar recommendations that subsidies not be concealed in mail pay have been made many times by, among others, the Post Office Department, the Department of Commerce, the Federal Coordinator of

Transportation, and the Board of Investigation and Research. A somewhat different view was taken, however, in the recent report of the House Committee on Interstate and Foreign Commerce on "Public Aid to Air Transportation" (H.Rept. 1612, 80th Cong., 2nd sess., p. 5).

Two bills introduced in the first session of the 81st Congress (S. 1077 and S. 2437) would effect such a separation.

Also on the subject of air-mail payments the Sawyer report further suggests (1) amendment of the Civil Aeronautics Act to replace the "need clause" (characterized as in effect a 'cost-plus system') with "new provisions empowering the regulatory agency to establish in advance subsidies at fixed rates for a given time period for groups or classes of carriers" (p. 41) and (2) the initiation of steps to terminate subsidy assistance to air carriers "in cases where it is clear that little net contribution to commercial or national defense needs is being furnished by particular services." (p. 49)

Proposals for Changes in Shipping Subsidies

The report criticizes various aspects of the existing programs for construction differential and operating differential shipping subsidies. Recognizing that "some form of operating subsidy is necessary if most American shipping companies are to remain in existence in competition with lower cost foreign operators," (p. 32) the report suggests that the "trade route concept" for subsidy payments be abandoned as unduly preferential to certain carriers and that a possible alternative would be "a system of subsidies to all American shipping companies operating in the foreign trade with the subsidy computed on the basis of a certain percentage of the labor costs of the shipping lines." (pp. 32, 48)

The report also calls attention to the need for more definite standards to govern administration of the construction differential subsidy program, particularly as to "what is to be included in national defense features to be paid for entirely by the Government." (p. 29)

Regulatory Activities

Tentative suggestions in the report regarding regulatory activities affecting transportation appear to have been less fully considered than those pertaining to promotional activities discussed above. This is indicated by various notations to the effect that no intensive examination of the subjects discussed was possible in connection with the preparation of the report, and that "careful studies" would be needed as a basis for sound conclusions.

It may be well, nevertheless, to note briefly some of the more significant subjects touched upon in the report and the provisional comments regarding them. Such matters pertaining to regulation include the following:

1. Referring to the advantages which might accrue from the consolidation of all regulatory functions under unified control, the report observes that "it is probable that a consolidation of regulatory controls will eventually be necessary." But doubts are indicated as to whether "at this time" the advantages of such action would "outweigh the special considerations which led to the establishment of separate regulatory authorities for shipping and air transportation." (pp. 100-101)

2. With reference to the Reed-Bulwinkle Act (Public Law 662, 80th Cong.) the Sawyer report suggests its repeal "unless effective and continuous supervision of [carrier rate] conferences is maintained by

the regulatory agencies and unless more specific standards for prescribing rates are developed than at present." (p. 88) Bills (H.R. 2167 and H.R. 5536) were introduced in the 81st Congress, 1st session, to effect such repeal of exemption from the anti-trust laws.

3. Regarding the regulation of security issues and related financial matters, the report suggests that "carriers receiving financial assistance from the Federal Government should have effective controls over their financial practices because in their absence the Federal Government is likely to have to pay the price of financial difficulties of private carriers." (p. 91) This proposal would have reference particularly to the establishment of financial regulation over air carriers and ocean shipping operators.

4. On through routes and joint rates, the report suggests that "a more effective utilization of the different forms of regulated transportation might result if greater use were made of joint rates, routes, and facilities." (p. 71) Bills relating to the matter introduced in the first session of the 81st Congress were S. 2826 (motor carriers) and S. 792 and H.R. 2138 (through routes by mail).

5. On railroad consolidation, it is proposed that efforts be made to promote or require consolidations and unifications. It is also suggested that "immediate consideration" be given to "a more liberal policy" with respect to abandonments of unprofitable facilities and services which can be furnished by other types of carriers. (pp. 94-95) In this connection reference is made to the possible relinquishment by the railroads of small shipments (express and small amounts of l.c.l. freight) and that methods of payment for railroad carriage of mail be reconsidered so as to facilitate movement of the mails by the most efficient means. (pp. 95-96)

6. The report also contains rather extended references to rate structures, with considerable emphasis and approval given to the proposition that all transport rates should be closely adjusted to the "fully distributed costs" of each carrier and type of carriers (pp. 69-70, 108) But the report also stresses in various places the desirability of more unrestrained competition in transportation. It seems to be overlooked that less and not more competition between carriers would be the result if rates were to be fixed in accordance with some rigid system of "fully distributed costs."

STATE AND LOCAL

Department Editor: Madeline C. Dinu*

1949 REPORT OF AERONAUTICAL LAW COMMITTEE OF AMERICAN BAR ASSOCIATION

THE Standing Committee on Aeronautical Law herewith submits its report for 1948-1949.

THE ASSOCIATE AND ADVISORY COMMITTEE

Last year the House of Delegates authorized the appointment of an Associate and Advisory Committee. This committee, consisting of five members, has functioned as if it were a part of the Standing Committee. As indicated in last year's report, this enlarging of the opportunity to participate in aeronautical law activities should in time afford a better basis on which to decide the question of creating a Section on Aeronautical Law.

JURISDICTION IN THE AIR SPACE

In our form of Federal-State Government, the ebb and flow of interrelations between these two types of ruling authorities presents a constant procession of intriguing problems. One of these problems was raised by *United States v. Causby*, 328 U.S. 256 (1946). The case of *United States v. California*, 332 U.S. 19 (1947) developed additional and related problems. In the *Causby* case, the Supreme Court divided the air space into two zones, a lower zone in which private property exists as in state territory generally and an upper one in which the rights of the Federal Government are paramount. In the *State of California* case, the Supreme Court held that the state is not the owner of the three-mile marginal ocean belt along its coasts or the lands underlying that belt. These two cases and some of the numerous and interesting questions which they present are ably discussed by a former Chairman of the Committee on Aeronautical Law, Mr. John C. Cooper, in an article entitled "State Sovereignty vs. Federal Sovereignty of Navigable Airspace," published in the JOURNAL OF AIR LAW AND COMMERCE, Volume 15, page 27. Mr. Cooper, who is now a member of the Institute for Advanced Study at Princeton University, has also analyzed the *State of California* case in a most competent manner in a letter, dated March 5, 1948, to Honorable Alexander Wiley, who was at that time the Chairman of the Committee on the Judiciary of the United States Senate.

The Committee on Aeronautical Law at its meeting in Chicago on January 30, 1949, decided that these two cases open up such important fields for legal research as to make it desirable to promote a broad scale study of the cases and their implications by one of the leading law schools of the country. The committee is endeavoring to secure an undertaking by some such law school to study, report upon, and make recommendations upon the following questions, or such revised or different phrasing thereof, or of related matters, as may develop in the course of study:

(1) What are the respective jurisdictions of the federal and state governments, and the related implications, growing from the division of the air

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space pursuant to the *Causby* decision into a lower zone in which private property exists and an upper zone in which the rights of the Federal Government in the public domain seem to be preserved?

(2) How does the *Causby* case affect airport zoning and the rights and privileges of airfields, particularly small airfields in a metropolitan community?

(3) In the light of the decision in the *California* case in which the court found that the State of California is not the owner of the three-mile marginal ocean belt along its coasts nor the lands underlying that belt, where are the seaward air space boundaries of the United States across which foreign aircraft cannot fly without the permission of the United States?

(4) Is the air space over the marginal three-mile belt part of the territory of the adjacent states?

Numerous subsidiary and collateral questions are involved in the principal ones tentatively stated above. It is believed that if through committee sponsorship a thoroughly lawyerlike and scholarly approach can be made to the problems raised in these questions, a substantial contribution will be made in one of the most important fields of aeronautical law.

Civil Aeronautics Board's Economic Program for 1949

The Civil Aeronautics Board (CAB) on February 21, 1949, took the unprecedented step of making available to the industry and to the public a statement of its policy, setting forth the Board's "Economic Program for 1949." By this constructive program, which was well received, the Board undertook for the first time to state in one place and in a compact and manageable form its attitude and its policy toward important regulatory matters. As indicative of its contents, the main headings are as follows: Mail Rates, Economy and Efficiency, Industry Financing, Routes and Competition, Commercial Rates and Fares, and Development of New Markets for Air Transportation. In connection with the issuance of this economic program, the Board instituted a number of investigations and issued rate and other orders, each of which constituted a step in carrying the program into effect.[1]

Sale of Gasoline and Oil at Airports

On February 16, 1949, the Administrator of Civil Aeronautics wrote the chairman of the committee requesting the views of the committee concerning proposed changes in the somewhat detailed regulations by the Administrator under Section 11(1) of the Federal Airport Act with respect to the sale and delivery of aviation gasoline and oil on airports sponsored under the Federal Airport Aid Program. Under these regulations, the operator of an airport was permitted to grant an exclusive gasoline concession on the airport itself. However, gasoline could be purchased off the airport and brought on it for use, subject to certain restrictions.

Section 11(1) states that "As a condition precedent to his approval of a project under this Act, the Administrator shall receive assurances in writing, satisfactory to him, that the airport to which the project relates will be available for public use on fair and reasonable terms and without unjust discrimination." Pursuant to this authority, the Administrator prescribed a detailed regulation under which, *inter alia*, gasoline and oil purchased off the airport could be required by the Sponsor to be stored in places designated by him, to be limited to the amount of storage space available, and to be dispensed and delivered in the manner required by the Sponsor. The Administrator suggested three detailed alternative proposals:

[1] A copy of this Economic Program for 1949, dated February 21, 1949, may be secured through Mr. M. C. Mulligan, Secretary of the Civil Aeronautics Board, Washington 25, D. C.

(1) Eliminate the entire regulation dealing with services on an airport sponsored under the Federal Aid Airport Program and rely on the statutory language;

(2) Eliminate just so much of the regulation discussed above dealing with the sale and delivery of aviation gasoline and oil; or

(3) Substitute for the existing portion of the regulation regarding gasoline and oil a provision prohibiting exclusive concessions to any person other than the Sponsor of the airport himself.

This letter from the Administrator was circulated among the members of the committee and of the associate and advisory committee for comment. Most of the members sent in letters covering all phases of this proposed revision. The chairman of the committee did not feel, however, that without prior authorization of the House of Delegates, he could present the view of the committee as a whole, and therefore, sent the Administrator a digest of the various individual opinions presented which was acknowledged as being of great assistance in clarifying the problem.

The members in their comments raised several important points. One question discussed at length was whether an airport owner could ever grant an exclusive gasoline concession under the Anti-Trust laws or Section 303 of the Civil Aeronautics Act prohibiting exclusivity where the expenditure of Federal funds is involved. The question was also considered whether or not the Administrator was intended to have any authority at all derived from Section 11(1) to prescribe such detailed regulations dealing with the subject. Finally, the extent to which this problem was primarily a local problem to be dealt with in terms of the immediate factual situation rather than by blanket regulation on a national level was analyzed.

The chairman was advised on May 17, 1949, that the regulatory provisions dealing with the sale and delivery of gasoline and oil had been eliminated from the regulations, indicating an adoption of proposal (2) above. It would seem that the question of primary importance, that of exclusivity (which has not yet been officially decided), can be handled outside of the Federal Airport Act.

HOOVER COMMISSION

In its report to Congress, the Commission on Organization of the Executive Branch of the Government recommended the following, among other, changes in the organization of agencies exercising functions affecting aviation:

(1) The Secretary of Commerce would be assigned the duty of developing an over-all route pattern for land, sea, and air. When individual carriers or groups of carriers make recommendations to the Civil Aeronautics Board at variance with his over-all route program, it is suggested that the Secretary appear before the Board to present his views. Similarly, it was felt advisable that he have the authority to initiate route changes.

(2) The executive functions of the Civil Aeronautics Board would be transferred, insofar as possible, to a recommended Bureau of Civil Aviation, Department of Commerce. "Executive" functions were not defined.

(3) The safety enforcement function, now exercised by the Civil Aeronautics Administrator, and the safety rule-making function, now exercised by the CAB, would be transferred to the Bureau of Civil Aviation. There would be a right of review in the CAB from the promulgation of specific rules or from the refusal to do so.

(4) The National Advisory Committee for Aeronautics would also be placed in the new Bureau of Civil Aviation. This committee is presently an independent committee which supervises and directs fundamental research and scientific studies for civil and military aviation. The Commission doubted whether it was sufficiently important, despite its size, to warrant independent status. A dissenting Commissioner, however, pointed out that he did not feel that the organization problems of the committee had been sufficiently explored by the Commission to justify this definite recommendation since at least ten executive agencies, including the National Military Establishment, are concerned with the research it conducts.

(5) The chairman of the CAB would exercise all administrative functions of the Board.

(6) Statutory authority would be provided to permit the Board to delegate routine, preliminary, and less important work to members of the staff under the Board's supervision.

There were various other recommendations. Some of the recommendations applied to regulatory commissions generally, including the CAB.

This is the third current recommendation for the reorganization of the civil aeronautic agencies. The first was that of the President's Air Policy Commission, included in the Commission's report, entitled "Survival in the Air Age," and the second was the report of the Congressional Aviation Policy Board, created by Public Law 287 of the 80th Congress. Those portions of the Hoover Commission Report dealing with the civil aeronautics are found in the Hoover Commission's Reports on "Regulatory Commissions" and on the "Department of Commerce."

International Air Transport Agreements

In last year's report, the committee reported that the United States is a party to thirty-six bilateral agreements with foreign countries providing for the operation of international airlines. Since that time four additional bilateral agreements have been entered into authorizing additional operations in this field.[2]

There have been no additional concrete plans made for carrying forward the efforts to secure a multilateral international convention on air routes since the failure to reach an agreement at the conference held in Geneva in the fall of 1947, as reported in last year's report.

Warsaw Convention

As indicated in last year's report, the Legal Committee of ICAO is considering various modifications of the Warsaw Convention, including particularly whether or not the present liability limit of approximately $8,291.87 should be raised. The Air Coordinating Committee has surveyed the United States' position, both within and outside government circles. The ACC has made every effort to secure the views of interested parties, including those of the committee. The responses of committee members to the solicitation

[2] The additional agreements are with Bolivia, Burma, Finland, and Panama. Of the 40 agreements, those requiring ratification which are still awaiting ratification are: Syria, Uruguay, Bolivia, and Venezuela. In addition to the 40 countries, Pakistan has adopted the agreement with India. The Argentina agreement is not in effect pending conclusion of an agreement on specific routes.

therefor, handled by Mr. William Burton, acting as a Subcommittee of one for the purpose, were made available in summary form to the ACC.

The United States' position with respect to the Warsaw Convention, taken before the Legal Committee of ICAO, was, in effect, as follows:

1. The United States approves of the existing limit of liability concerning cargo and baggage.
2. The United States would be opposed to any reduction in the limit of liability for the death of a passenger, but could support a moderate increase, if desired by the other contracting parties.
3. The United States feels that the existing limit of liability for serious injury, such as a permanent disability, is low and is hopeful that the other contracting parties will be prepared to incorporate a revision of this limit in a new convention if the study requested by the Second Assembly of ICAO indicates a clear need for a new convention.

ROME CONVENTION

The United States Government is taking the following positions before the Legal Committee of ICAO with respect to the Rome Convention dealing with the subject of liability for damage caused to third persons or property on the surface by aircraft operated internationally:

The United States Government is strongly in favor of changing the principle of the Rome Convention according to which the operator, with certain exceptions, is absolutely responsible for damage caused to third persons or property on the surface, to the principle that the operator shall be liable for damage to innocent third persons or property on the ground only if he is not able to prove that he had taken all measures to avoid damage and to avoid events leading thereto which an operator exercising the highest degree of care would have taken under the circumstances. In other words, the rule of absolute liability of the Rome Convention, adopted while aviation was in its infancy, should now be changed because experience has proved that aviation is no more dangerous than many other normal business activities.

There are numerous other positions which the United States Government has taken with respect to the proposed revisions of the Rome Convention and related matters.[3]

LEGISLATION DEALING IN CONTRACTS BETWEEN THE GOVERNMENT AND AIRCRAFT MANUFACTURERS

(1) *Profit Limitation and Pricing Policy*

The aircraft industry is faced today with a major problem through the anomalous situation of two statutes both applicable to the question of profit limitation on contracts with the Government for the procurement of aircraft and aircraft parts. The Vinson-Trammell Act of March 27, 1934, as amended (34 U.S.C. 495), provides for a profit limitation on aircraft construction of 12% based on actual costs. The Renegotiation Act of 1948 (Section 3 of Public Law 547, 80th Congress) requires renegotiation of all

[3] For anyone interested in securing more detailed information of the United States' position in these respects, a copy of ACC 88/1C can be obtained from the Air Coordinating Committee, Washington, D. C.

contracts and subcontracts for the procurement of aeronautical equipment in excess of $1,000 and, under the discretionary authority given the Secretary of Defense under Section 401 of Public Law 785 of the 80th Congress, it can be directed that all contracts for the procurement of aircraft and aircraft parts be subject to the provisions of the Renegotiation Act.

The committee fully recognizes that some sort of profit limitation may be necessary to protect the Government, but it believes that while either of these Acts alone would afford such protection, together they result in much costly duplication and administrative confusion to the aircraft industry and its suppliers without any additional advantage to the Government. The administrative procedures incident to compliance with both of these statutes place a tremendous and costly bookkeeping burden upon the contractor and subcontractor and require the maintenance by the Government of a large additional number of auditors and examiners.

The committee understands that at this time the question is being widely discussed in the National Military Establishment and the Bureau of the Budget and that it is contemplated that an amendment seeking to cure this overlap will soon reach Congress. Because the matter is in somewhat of a flux, the committee has refrained from taking a definite stand as to the preference of one or the other of these statutes either in their present or a possibly revised state. It does believe, however, that at least this overlap should be considered at an early date by Congress and that steps should be taken to provide that contracts or subcontracts subject to the recent Renegotiation Act should not be also subject to the existing Vinson-Trammell legislation.

The introduction of renegotiation as a new technique for eliminating excess profits in the aircraft industry has raised two additional problems which should be given immediate attention.

(a) It is suggested that serious consideration be given to the thought that the theory of averaging profits and losses, similar to the carry-back and carry-forward provisions of Section 122 of the Internal Revenue Code, be made applicable to the principle of renegotiation. A long period of processing before deliveries with attendant engineering and design changes inherent in aircraft production is now facing the industry. (It takes from two to seven years to complete a production contract for modern aircraft.) The averaging theory, fully recognized by the Government in the Internal Revenue Code, appears to be more equitable under these circumstances than renegotiation treatment on a fiscal year only basis. Thus, should in any year the amount of profit earned by the contractor or subcontractor be less than that to which he is entitled, such deficiency will first be applied against prior refunds of excess profits under the 1948 Act, if any, and secondly, the remainder shall be carried forward to future years to be offset as a reduction against any determination of excessive profits, if any, in such years. To the extent the deficiency is applied against prior years' excessive profits, the contractor or subcontractor should be entitled to a refund from the Government. It would seem that this principle could be effectuated in regulations issued by the Secretary of Defense pursuant to the Renegotiation Act of 1948, but if the position now taken in various Government Agencies is correct that there is no authority therein for such action, curative legislation would be desirable.

(b) It would also seem advisable that it be optional with the contractor as to whether or not fixed price contracts with the price redetermination clause and incentive fixed price contracts, providing for a target price and a maximum price with price redetermination, shall be subject to renegotiation. It is believed that, in the main, price redetermination does serve the same

purpose as renegotiation and will eliminate needless and superfluous reviews and audits. The purpose of a target price contract is frustrated if the profit bonus earned by the contractor may be taken away from him on renegotiation, but he bears the possibility of loss if the maximum price is exceeded. Again, the committee does not take a position on which of these methods is preferable, but suggests that they should not overlap. It would seem that under the Renegotiation Act the Secretary clearly has power to remedy this situation through his authority to exempt "any other contract or subcontract, both individually and by general classes and types."

(2) *Settlement of Terminated Government Contracts*

A substantial portion of the overall business of aircraft manufacturers is represented by contracts to supply aircraft parts and technical services to various agencies of the Government. All such contracts reserve to the Government the right to terminate the contract for the convenience of the Government. When such terminations occur, the contractor is vitally interested in the proper settlement of his claim against the Government for costs resulting from the termination. Concern about the matter of prompt settlement of termination claims is currently being expressed by representatives of all types of industry engaged in any degree in contracting with the Government, but because of the proportion of its overall business which is represented by Government contracts, and because of changes in requirements by the various branches of the Armed Forces, the aircraft industry is particularly concerned about the matter.

The Contract Settlement Act of 1944 was enacted for the purpose of providing statutory authority necessary to enable the Government to accomplish expeditiously the difficult task of terminating claims arising out of the World War II program. It is the opinion of the committee that the great majority of termination settlements carried out under the authority of the Contract Settlement Act were entirely fair and reasonable, both to the Government and to the contractor, and resulted in great benefit to the people and to the economy of the country. The committee feels there may be some room for difference of opinion as to whether an agency of the Government may negotiate a settlement of a contractor's claim resulting from the termination of the contract without express statutory authority but there can be no room for disputing the fact that without such specific authority all negotiated settlements will be subject to review and re-appraisal with attendant uncertainty and confusion. The Contract Settlement Act of 1944 is not applicable to present Government contracts and the proper disposition of materials and property rendered unusable because of terminations has been seriously impeded due to inapplicability of the Surplus Property Act of 1944. Public Law 862 (80th Congress) makes it clear that surplus property disposition procedures based upon the statutory authority of the Surplus Property Act of 1944 may not be applied as to any property not declared surplus as of 30 June 1948.

The committee believes that serious consideration should be given to the question of legislation, both as to settlement of terminated contracts and as to disposition of surplus property, if the confused situation existing between World War I and World War II is to be avoided. The committee will not attempt to recommend any specific legislation but suggests that it might very well embody the general features of the Contract Settlement Act of 1944 which have been demonstrated to provide an effective framework within which to carry out termination settlements and should make

available adequate and workable property disposition procedures. Among the essential elements of such legislation which should be explored are the following:

(a) Assurance of finality as to any settlement entered into in accordance with the provisions of the statute except, however, any such settlement as may have been procured by fraud.

(b) Provision for adequate interim financing of contractors in event of terminations.

(c) Provision for adequate regulations and procedures to carry out the objectives of such legislation and an overall authority to assure compliance with those regulations and procedures by the various Government contracting agencies.

(d) Provision for appeal from determinations of contracting officers or contracting agencies to an independent appellate body similar to that of the Appeals Board of the Office of Contract Settlement where persons who deem themselves to have been aggrieved by such determinations may obtain a prompt and fair review.

(e) Provision for adequate procedures to protect the interests of the Government in the disposition of material and property rendered surplus or obsolete by reason of terminations, to enable the contractor to clear his plant of such property and material without delay and thus permit him to resume normal operations with as little hardship as possible and to aid in obtaining adequate prices for such property and materials and eliminate unnecessary waste.

A solution to this problem is urgently needed at the present time in order to prevent mounting confusion, unnecessary cost and expense to the Government and hardship to the aircraft manufacturing industry.

Respectfully submitted,

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JUDICIAL AND REGULATORY DECISIONS

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ABANDONMENT OF INTRASTATE SEGMENT OF INTERSTATE AIR ROUTE

IT has been reported that many airlines are anxious to abandon service to smaller stops to which they were certificated in the flurry of post-war expansion.[1] This tendency toward voluntary applications for abandonment, coupled with the prospect of more frequent use of the Civil Aeronautics Board's powers to alter, amend, modify, and suspend routes,[2] may eventually result in an answer to the question of just how extensive the Board's powers are in respect to economic regulation of intrastate air operations which affect interstate air transportation.

It is reasonable to assume that in many cases in which the decision of the Board may alter an intrastate service which is incidental to the interstate service primarily under consideration, the State regulatory commission and other state and local interests will enter the picture, not always in a mood of humble subjection to the will of the federal agency. This possibility was anticipated by Chicago and Southern Air Lines in its recent application to the Board to abandon the Illinois cities of Bloomington, Peoria, and Springfield, to which the airline was certificated under its Chicago-New Orleans route.[3] Chicago and Southern also held a certificate from the Illinois Commerce Commission covering this intrastate segment of the route. In recognition of this dual regulation, Chicago and Southern pointedly asked the Board that the requested abandonment order be made effective as of the date that an abandonment order from the Illinois Commerce Commission should become effective, or be worded in such manner as to eliminate the possibility of the airline being required by the state agency to continue a service which has been ordered abandoned by the Board. Does the Board, under the Civil Aeronautics Act, have sufficient authority to prevail over the intrastate interests?

The Board's opinion in the *Chicago and Southern* case, while based upon a consideration of intrastate and local interests as well as upon the interstate aspects of the service,[4] expressed no doubt concerning the Board's authority to prevail over these interests, and did not discuss the possibility of conflict

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[1] American Aviation, April 15, 1949, p. 6, "There's hardly a trunk airline in the industry that doesn't want to get out of serving some of the small stops to which they have been certificated within the past three years. Airlines asked for small stops as protection against feeder expansion, but most such stops have been costly to serve. Even secondary carriers want to abandon the smaller cities. There will be increasing action by airlines toward suspension requests, and in some areas feeder airlines will take over the service."

[2] O'Connell, *Legal Problems in Revising the Air Route Pattern*, 15 J. Air L. & C. 404 (1948). "I believe that you can look forward to an increasingly frequent use of the Board's powers under Section 401(h) of the Act . . . Certainly the Board has not yet exercised its authority under this section sufficiently to be able to say that we have inadequate legal powers in this field."

[3] CAB Docket No. 3571. Application granted as to Peoria and Springfield; deferred as to Bloomington, *Chicago and Southern Air Lines, Inc. Abandonment of Service to Peoria, Springfield and Bloomington*, 10 CAB..., (Serial E-3488, Oct. 27, 1949).

[4] *Chicago and Southern Air Lines, Inc. Abandonment of Service to Peoria, Springfield and Bloomington*, 10 CAB..., (Serial E-3488, Oct. 27, 1949), Appendix A (Report of Examiner).

with any action taken by the Illinois Commerce Commission. Instead, the Board adopted the following language of the examiner's report: "Although these cities clearly should have adequate air service such service should be economical, efficient and void of useless and destructive competition . . . Clearly, the maintenance of such luxury competitive service cannot be considered as being in the public interest, and its continuance is not necessary for the purpose of assuring the sound development of an air transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the National Defense." [5]

It is well established that the Congress has power to regulate intrastate commerce to the extent that such regulation is incidental to the effective regulation of interstate commerce.[6] The extremes to which this concept can be extended have been demonstrated in recent years by cases arising in fields other than transportation.[7] Granting the power of Congress to regulate the economic aspects of aviation just as broadly as it has these other fields of commerce, has Congress actually done so in the Civil Aeronautics Act?

The words used by Congress in the economic regulations of the Act do not clearly indicate that the regulations were intended to cover such intrastate commerce. That more express language might have been used is illustrated by comparison with the words used to define the Board's jurisdiction in safety matters and with the language of the Interstate Commerce Act in the railroad field.

The safety provisions of the Civil Aeronautics Act and the economic regulations differ in their express coverage by virtue of the Act's definitions of "air commerce" and "air transportation." "Air commerce," which sets forth the scope of the Board's jurisdiction in safety matters,[8] is defined in such a way as to subject practically all operations to federal safety regulation.[9] In contrast, "air transportation," which term describes the Board's jurisdiction

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[5] *Id.* at 23.

[6] This was best said by Chief Justice Taft in *Railroad Commission of Wisconsin v. Chicago, Burlington and Quincy RR Co.*, 257 U.S. 563 (1922) (*Wisconsin Rate Case;* federal increase of discriminatory intrastate rail rates to correspond with interstate rate increases upheld.), "Commerce is a unit and does not regard state lines, and while, under the Constitution, interstate and intrastate commerce are ordinarily subject to regulation by different sovereignties, yet when they are so mingled together that the supreme authority, the nation, cannot exercise complete effective control over interstate commerce without incidental regulation of intrastate commerce, such incidental regulation is not an invasion of State authority." Also *Southern Railway Co. v. U.S.*, 222 U.S. 20 (1911) (federal regulation of railroad vehicles used only in intrastate traffic upheld as valid exercise of commerce power because of "real or substantial relation or connection" with interstate commerce); *Houston, East and West Texas Railway Co. v. U.S.*, 234 U.S. 342 (1914) (*Shreveport Rate Case;* federal regulation of intrastate rail rates which discriminated against interstate traffic upheld).

[7] *Martino v. Michigan Window Cleaning Co.*, 327 U.S. 173 (1946) (Employees of corporation which washed windows under contracts with customers engaged in production for interstate commerce, held to be engaged in same and subject to Fair Labor Standards Act); *U.S. v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942) (Federal control of milk produced and distributed solely within Illinois upheld due to effect on interstate milk regulations); *Wickard v. Filburn*, 317 U.S. 111 (1942) (wheat grown for individual's private use subject to federal quota system due to effect on interstate commerce).

[8] 52 Stat. 1007 (1938), 49 USCA §551 (a) (Supp. 1948).

[9] 52 Stat. 977 (1938), 49 USCA §401 (3) (Supp. 1948). "'Air commerce' means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any civil airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce." In effect, this leaves only intrastate aviation which operates outside civil airways and far enough removed therefrom so as not to affect or endanger interstate air operations.

in the field of economic regulation,[10] is by definition restricted to carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail, in interstate, overseas, or foreign commerce.[11] By so expressing the Board's jurisdiction in economic matters, the Congress certainly did not write into the economic sections of the Act the specific ideas of broad jurisdiction which are included in the safety sections.[12]

That the language which sets forth the economic jurisdiction of the Board may not be as broad as it could be is also demonstrated by a consideration of the jurisdiction granted the Interstate Commerce Commission in the railroad field by the Interstate Commerce Act. That Act subjects to regulation all common *carriers* engaged in railroad transportation,[13] but exempts *transportation* which is wholly intrastate.[14] The abandonment provisions are made applicable to all *carriers* subject to that Act and apply to "all or any portion of a line of railroad," [15] which read literally, appears to cover wholly intrastate abandonments. However, the courts have in effect limited the abandonment provisions to *transportation* subject to the Act, by refusing to include a purely intrastate line which had no connection with or effect on interstate commerce.[16] The more express language of the Interstate Commerce Act setting forth the Commission's jurisdiction has been sufficient to handle the railroad counterpart of the *Chicago and Southern* case—in *Colorado v. United States*, a federal order to abandon an economically burdensome intrastate branch was held to be valid because of the economic effect on the interstate activities of the carrier.[17]

Of course, these comparisons of the language used in the statutes are of limited value, since the courts are not confined to a strict, literal interpretation of a statute, especially when the purposes and policies behind a statute appear to license broader interpretation and application. This has proven to be particularly true in cases involving interstate commerce.[18] However, in the transportation field, leading cases upholding federal regulation of intrastate commerce as incidental to the effective control of interstate commerce have been based upon statutes which go far in expressing the intent of Congress to regulate such intrastate activities.[19] For example, in the *Shreveport Rate Case*,[20] the Supreme Court upheld federal regulation of intrastate rail rates which discriminated against interstate traffic, but in doing so, the Court relied upon a statute which clearly outlawed the dis-

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[10] 52 Stat. 987 (1938), 49 USCA §481 (a) (Supp. 1948).

[11] 52 Stat. 977 (1938), 49 USCA §401 (10), (21) (Supp. 1948).

[12] Rhyne, *Federal, State and Local Jurisdiction Over Civil Aviation*, 11 Law & Contemp. Prob. 466 (1946).

[13] 41 Stat. 474 (1920), 49 USCA §1 (1) (1929).

[14] 41 Stat. 474 (1920), 49 USCA §1 (2) (1929).

[15] 41 Stat. 477 (1920), 49 USCA §1 (18) (1929).

[16] *Texas v. Eastern Texas Railroad Co.*, 258 U.S. 204 (1922).

[17] 271 U.S. 153 (1926).

[18] *Martino v. Michigan Window Cleaning Co.*, 327 U.S. 173 (1946); *U.S. v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942); *Wickard v. Filburn*, 317 U.S. 111 (1942); see note 7 *supra*.

[19] *Southern Railway Co. v. U.S.*, 222 U.S. 20 (1911), cited *supra* note 6; *Colorado v. U.S.*, 271 U.S. 153 (1926) (federal order to abandon economically burdensome intrastate branch upheld because of effect on interstate commerce); *Wisconsin Rate Case*, 257 U.S. 563 (1922), cited *supra* note 6. In these cases, if power already existed, there would have been no need for additional legislation; mere fact of additional legislation indicated Congressional intent to go further and give these express powers over intrastate commerce incidental to regulation of interstate commerce.

[20] *Houston, East and West Texas Railway Co. v. U.S.*, 234 U.S. 342 (1914), cited *supra* note 6.

criminatory practice involved in the case.[21] That the acknowledged power of Congress to regulate this type of intrastate commerce can go unexercised, as has been suggested may be the case in regard to the economic regulations of the Civil Aeronautics Act, was recognized in the *Shreveport* case, the Court saying, ". . . in view of the aim of the act and the comprehensive terms of the provisions against unjust discrimination, there is not ground for holding that the authority of Congress was unexercised and that the subject was thus left without governmental regulation . . ."[22]

If, however, the courts consider the general policies of the Civil Aeronautics Act, as they may be expected to do, in determining the economic jurisdiction of the Board, there is reason to believe that the Act will be liberally construed to include economic regulation of intrastate commerce as an incident to the effective regulation of interstate commerce. The declaration of policy of the Act[23] does not once use the term "interstate commerce," but rather "domestic commerce."[24] The latter term is not defined in the Act, but generally it means commerce carried on within the limits of the Nation as distinguished from foreign commerce.[25] The term as used in the Act has never been defined by the courts, but it is reasonable to assume that it covers intrastate commerce within the United States as well as interstate commerce; if the Congress had meant merely interstate commerce, it logically would have used that more exact term.

Applying the maxim that between an unconstitutional interpretation of a statute and an equally reasonable constitutional interpretation, the latter will be favored, it may be assumed that "domestic commerce" as referred to in the declaration of policy of the Act includes only that intrastate commerce which Congress may validly regulate, i.e., intrastate commerce the regulation of which is incidental to the effective regulation of interstate commerce.[26]

Another point in the policy statement favors a liberal interpretation of the economic regulations. One of the factors which the Board is directed to consider in carrying out its powers and duties is "sound economic conditions" in the industry.[27] This factor is presumably equally as commanding as the other policy considerations, and appears to cover the case of an intrastate operation which is economically burdensome to an interstate carrier. In view of the foregoing considerations, a broad interpretation of the economic regulations to include many intrastate operations is not an unexpected development.

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[21] 24 Stat. 380 (1887), 49 USCA §3 (1) (1929) "Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

[22] *Houston, East and West Texas Railway Co. v. U.S.*, 234 U.S. 342 (1914), at 358-359.

[23] 52 Stat. 980 (1938), 49 USCA §402 (Supp. 1948).

[24] For example, para. (a), "The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and *domestic* commerce . . ."; and para. (d), "Competition to the extent necessary to assure the normal development of an air-transportation system properly adapted to the needs of the foreign and *domestic* commerce . . ." (emphasis supplied throughout).

[25] BLACK'S LAW DICTIONARY 359 (3d ed. 1933). "Domestic commerce" also means, in reference to a state, commerce wholly within the state as distinguished from interstate commerce; this meaning should not be confused with the use of the term on a national level.

[26] *Wisconsin Rate Case*, 257 U.S. 563 (1922), cited *supra* note 6.

[27] 52 Stat. 980 (1938), 49 USCA §402(b) (Supp. 1948).

Thus far, the economic regulations, as applied to physically intrastate operations, have been before the courts only once, in *Civil Aeronautics Board v. Canadian Colonial Airways*.[28] That case is of dubious value, however, in that it presented primarily a question of whether the airline was engaged in interstate commerce or not, rather than whether an acknowledged intrastate operation was a burden on interstate commerce and subject to the Board's authority on that ground. The route was, geographically, wholly intrastate, being from New York City to Niagara Falls, and was not certificated by the Board. Acting to enjoin the operation, the Board asserted its authority on the ground that passengers were using the service as a leg of interstate and foreign journeys. According to the Board, this was sufficient to characterize the service as interstate and therefore amenable to the authority of the Board. Canadian Colonial contended that even if the Board's argument were accepted, the airline could not be held to be engaged in interstate commerce if it was without knowledge of the origin and destination of its passengers. In issuing an order permitting the Board to examine pertinent documents and records of the carrier, the Federal District Court recognized the possibility that a physically intrastate air operation may be subject to the economic jurisdiction of the Board. However, any potentialities of this case as a court test of the Board's authority ended when the airline submitted to a consent decree permanently enjoining the operation.[29] The case is also of limited value in the question at hand in that there was no certificate from the State of New York, and the State took no part in the litigation, according to the reports.

The *Chicago and Southern* decision is an unequivocal assertion of Board authority over an intrastate service. While it reflects a consideration of state and local interests, it expresses no doubt concerning the Board's jurisdiction over the matter. It does not solve the problem that would be presented if the state and local interests in the case should choose to challenge the asserted authority of the Board.[30] It is probable that through such actions, the present language of the Act will be interpreted to have given the

[28] 41 F. Supp. 1006 (S.D.N.Y. 1940). The fact that more cases have not been considered by the courts is no indication of lack of Board authority in such matters, but probably reflects a reluctance of the Board to take up such situations without initial action by a carrier.

[29] Annual Report CAB 35 (1941).

[30] For a time, such challenge was in prospect. On November 4, 1949, Chicago and Southern petitioned the Illinois Commerce Commission for abandonment of the intrastate service and cancellation of its certificate with respect to the three Illinois cities (Proceeding No. 37906); a second petition by C & S on the same date sought suspension of service to Peoria (the only point then being actually served) pending action on the first request (Proceeding No. 37907). At the Examiner's hearing November 28, C & S challenged the jurisdiction of the Commission on the ground that the CAB has sole and exclusive jurisdiction over both interstate and intrastate commercial air transportation by virtue of the Civil Aeronautics Act. The case was then heard on its merits. On December 14, there having been no order on the aforementioned petition, C & S filed a time schedule with the Commission proposing discontinuance of its intrastate service as of December 26, the effective date of the CAB order cited *supra* note 3. The Commission, on December 21, answered this with an *ex parte* order suspending the proposed time schedule until April 25, 1950 and setting a hearing on the matter for March 21, 1950 (Proceeding No. 38029). On December 26, C & S suspended service to Peoria, in compliance with the CAB order, but contrary to the Commission's order of December 21. Two days later, C & S filed an action in the U.S. District Court (N. D. Ill., Eastern Division) requesting an order restraining the Commission and other defendants from attempting to compel operation of the intrastate service, and from enforcing any order of the Commission inconsistent with the Civil Aeronautics Act (No. 49-C-1961). A temporary order was granted. On January 19, 1950, the Commission suddenly acted upon the original C & S petition of November 4, 1949 (Proceeding No. 37906), and cancelled and rescinded the C & S certificate for intrastate service, and ordered that no action be taken to enforce penal provisions against C & S for discontinuance of the service prior to this order. However, the

Board broad powers to economically regulate these intrastate operations. However, the need for clarification of the Board's authority in this field is immediate. This has been recently illustrated by the California situation in which low-fare, non-certificated, intrastate carriers have been competing with certificated interstate airlines and clearly affecting the economic conditions of the latter.[31] Intrastate-interstate problems will become increasingly common with the extension of commercial air service to smaller communities within a single state which by virtue of such service find themselves within the stream of interstate commerce. To meet this growing problem and to clearly equip the Board with power to carry out the policies of the Act, the Congress should enact recently proposed legislation which would amend the Act to expressly give the Board economic jurisdiction over intrastate operations of interstate carriers and over the operations of intrastate carriers insofar as they compete with interstate carriers.[32]

BERNARD R. BALCH*

JUDICIAL REVIEW OF ROUTE ORDERS OF CIVIL AERONAUTICS BOARD

STATE Airlines Inc. and Piedmont Aviations Inc. sought local or "feeder"[1] air transportation certificates for an area in southeastern United States.[2] The Board granted a certificate of public convenience and necessity to Piedmont and denied State's application.[3] On petition for rehearing State urged that the Board's award to Piedmont was unlawful since Piedmont had not applied for the route which had been granted to it, and that by such a grant, the Board had acted beyond its jurisdiction.[4] Furthermore, State argued that the finding that Piedmont was fit, willing, and able was not supported by substantial evidence. The Board found, however, that Piedmont was an applicant for the route awarded to it, since it had included in its application a clause which requested not only the route detailed within the petition, but any modification of that route which the

Commission claimed jurisdiction of the matter, contrary to C & S's contention before the Examiner that the CAB has sole and exclusive jurisdiction. Finally, on January 25, the District Court entered an order dismissing the C & S action for a permanent restraining order, regarding the case as mooted by the January 19 action of the Commission.

[31] See American Aviation, July 15, 1949, p. 23, and September 1, 1949, p. 18.

[32] S. 2759, 81st Cong., 1st Sess., by Sen. Johnson (D.-Colo.) extends jurisdiction under the Act to include all but local carriers, and defines local carrier as a person in intrastate commerce whose operations do not compete with registered carriers under the Act.

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[1] A local or "feeder" air route is one made up largely of stops in small communities. These communities are tied in with larger communities by short haul operations. Thus, communities with a community of interest are joined regardless of size.

[2] The Civil Aeronautics Board consolidated for hearing in a single proceeding known as the *Southeastern States Case*, 7 C.A.B. 863 (1947), some 45 applications by 25 companies proposing new and additional air transportation services. The area included the states, or a portion of the states of Florida, Mississippi, Alabama, Georgia, South Carolina, North Carolina, Tennessee, Kentucky, Missouri, Ohio, Indiana, West Virginia, District of Columbia, and Maryland.

[3] The Board ignored the recommendations of the special Examiners who on June 4, 1946 issued their report recommending that the area be split into four separate "feeder" routes, one of which was to go to State, the others to Piedmont.

[4] For purposes of review of an order of the Board, there is no final order until a rehearing has been denied by the Board. *Braniff Airways* v. *C.A.B.*, 147 F.(2d) 152 (C.A.D.C. 1945).

Board thought necessary.[5] The Board ruled also that there was substantial evidence upon which it had based its findings that Piedmont was fit, willing, and able.

On petition for review the Court of Appeals for the District of Columbia in *State Airlines v. C.A.B.*, overruled the Board's decision.[6] The Court found that the route awarded was something more than mere modification of the route applied for; that section 401(d)(1) of the Civil Aeronautics Act required an application for the route before an award could be made;[7] and further that the award was arbitrary, capricious, and not supported by substantial evidence.

The case is of some consequence since it presents for the first time the question of the definitive limits of the Board's broad discretion. There is no doubt that essentially the selection of a certain air line for a new air route is a task for administrative judgment.[8] It has been felt that administrative agencies are peculiarly equipped to find the facts and should be the final arbiters of public interest concerning those facts.[9] The question now presented is whether the Board has gone too far in exercising its discretion. From its inception the Courts have given the C. A. B. a fairly free rein over their administrative domain.[10] The fulfillment of the substantial evidence test, always a necessary prerequisite, has not been a difficult task for the Board,[11] and as in the case of administrative determinations, generally, administrative findings constantly tend to replace court adjudications.[12] The Court here would not seem to be signalling a trend away from this munificent treatment; it merely appears to be pointing out to the Board the limits of its discretion.

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[5] The clause stated that Piedmont applied for authorization to engage in air transportation "on routes detailed herein or such modification as the Board may find public convenience and necessity to require."

[6] 174 F.(2d) 510 (C.A.D.C. 1949).

[7] "The authority shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to confrom to the provisions of this Act and the rules, regulations, and requirements of the authority hereunder and such transportation is required by the public convenience and necessity: otherwise, the application shall be denied." 52 Stat. 987 (1938) 49, U.S.C.A. §481(d) (1948 Supp.). The Court held that it was without power to order a certificate to State, and therefore remanded the case for further proceedings not inconsistent with the opinion. Piedmont has taken the case to the U.S. Supreme Court.

[8] *United Air Lines* v. *C.A.B.*, 155 F.(2d) 169 (C.A.D.C. 1946).

[9] *U.S.* v. *Pierce Auto Freight Lines*, 327 U.S. 515 (1946).

[10] For an example of this gentle treatment, see, *W. B. Grace & Co.* v. *C.A.B.*, 154 F.(2d) 231 (C.C.A. 2d 1946). "The review of orders of the Civil Aeronautics Board by the courts is not mere private litigation, but the public interest looms large and hence, there is no place on such review for overly-nice scrutiny of the pleadings and undue stress of alleged estoppels." See also: *U.S. Lines Co.* v. *C.A.B.*, 165 F.(2d) 849. (C.C.A. 2d 1948).

[11] *O'Carroll* v. *C.A.B.*, 144 F.(2d) 999 (C.A.D.C. 1944); *Cameron* v. *C.A.B.*, 140 F.(2d) 482 (C.C.A. 7th 1944).

[12] DIMOCK, ESSAYS ON LAW AND PRACTICE OF GOVERNMENTAL ADMINISTRATION, 298 (1935). This tendency or movement has at times been halted. As in the days of *Crowell* v. *Benson*, 285 U.S. 22 (1932), but with the exception of a few isolated cases such as *Pittsburgh Steamship Co.* v. *Brown*, 171 F.(2d) 175 (C.C.A. 7th 1948); *Daffin* v. *Pape*, 170 F.(2d) 622 (C.C.A. 5th 1948); and see note (1949) 44 Ill. L. Rev. 537; the trend in past years has been toward a less stringent judicial supervision over the administrative fact-finder. This lenient or "liberal" approach is seen in cases like: *South Chicago Coal & Dock Co.* v. *Bassett*, 104 F. (2d) 522 (C.C.A. 7th 1939), aff'd, 309 U.S. 251 (1940); *Gudmundson* v. *Cardillo*, 126 F. (2d) 521 (C. A. D. C. 1942); *Shields* v. *Utah Idaho Central Ry.*, 305 U.S. 177 (1938); *City of Yonkers* v. *U.S.*, 320 U.S. 685 (1943); *Davis* v. *Dept. of Labor*, 317 U.S. 249 (1942); *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 310 U.S. 573 (1940); *Del Vecchio* v. *Bowers*, 296 U.S. 280 (1935); *L'Hote* v. *Crowell*, 286 U.S. 528 (1932).

Judicial review of the Board's decision is provided for in Section 1006(a) of the Act,[13] and Section 1006(e) states that findings of fact by the Authority, if supported by substantial evidence, shall be conclusive.[14] The Court, though it believes that the questions of fitness, willingness, and ability are for expert judgment in aviation matters, feels that the Board has completely ignored the standards which Congress has set for it. It then appears that the case presents two questions; first, whether Piedmont's application was broad enough under the Act to support the Board's grant; and second, whether there was, in fact, evidence with which to support the Board's finding that Piedmont was fit, willing, and able to adequately perform such transportation.

The catch-all phrase in Piedmont's application contained the word "modification." Around the definition of this word centers the court's finding that the Board's action went beyond its jurisdiction in granting to Piedmont a route for which it had not applied. Modification has been judicially defined as a change, an alteration which introduces new elements of detail, but leaves the general subject matter or susbtance unchanged.[15] The Court held that the route awarded to Piedmont was more than a mere modification of detail, but was in fact a material alteration of the substance. Whereas a modification leaves the route substantially unchanged, the Board's action constituted a material deviation from the actual routes. The Board found support for their holding from cases coming from other Administrative agencies which found a variation from the issues specifically presented by the moving papers in the proceedings before them.[16] Upon examination, these cases do not appear to be authority for the proposition asserted. These cases do not give the Board sanction to completely ignore the moving papers or section 401 of the Act nor to make their findings without reference to the petitions before them. The cases merely allow the Board some leeway from the specific issues presented to them by the petitioners. The Court exercised the power to overrule the Board's findings since there was such a disparity between the route applied for and the route granted as to be arbitrary, capricious, and completely unreasonable. Since Piedmont applied for a specific route or any modification of that route the Court was not confronted directly with the question of whether or not the Act allows for any modification. The opinion of the Court merely stands for the proposition that the Board will be allowed a small degree of variance; if that variance has been applied for. Where, as here, the route awarded is a complete change from the route applied for, a catch-all clause petitioning for a modification of the route applied for may not be used by the Board to meet the necessity of an application for the route awarded.[17]

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[13] "Any order, affirmative or negative, issued by the Board under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in Section 801 of this Act, shall be subject to review by the Circuit Court of Appeals of the U.S. or the U.S. Court of Appeals for the District of Columbia upon petition, filed within 60 days after the entry of such order, by any person disclosing a substantial interest in such order . . ." 52 Stat. 1024 (1938), 49 U.S.C.A. §646 (Supp. 1948).

[14] 52 Stat. 1024 (1938), 49 U.S.C.A. §646(e) (Supp. 1948).

[15] *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938), *Cincinnati, Hamilton, and Dayton Ry. Co.* v. *Interstate Commerce Commission*, 206 U.S. 142 (1906); *Chicago, St. Paul and Minneapolis and Omaha Railway Co.* v. *U.S.*, 322 U.S. 1 (1943); *W.R.E.C.* v. *Federal Radio Commission*, 67 F.(2d) 578 (C.A.D.C.); *F.C.C.* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). Cited by counsel for the Board in their excellent brief in the Supreme Court of the U.S., Nos. 157 and 158, October Term, 1949, p. 19.

[16] Supra.

[17] It seems clear that the courts will allow the Board some varience in view of the cases cited above (Supra. 16) in the name of public convenience and necessity.

The significance of the Court's finding should not be underestimated. The issue of how much change the courts can allow is not mere rhetoric. To allow the Board to grant routes vastly different from those applied for makes judicial discovery of an arbitrary grant impossible, since the evidence before the Court as to a petitioning air line's fitness and ability would be entirely irrelevant.[18] The possibility of favoritism would be ever present with the relinquishment of this essential judicial check rein.

The Court's decision that there was no substantial evidence to support the Board's finding as to Piedmont's qualifications cannot be entirely divorced from its conclusion that Piedmont was not an applicant for the route awarded. It is obvious that Piedmont could not have evidenced its qualifications for a route for which it did not apply. This shortcoming is especially apparent in the present case since the two routes are over dissimilar terrain and would no doubt require the utilization of essentially different equipment and services.

The Board in the case of *Braniff Airways v. C.A.B.*[19] developed the presently followed tests for fitness and willingness. These are the ones which courts look to in order to determine whether or not there was evidence to support the Board's finding. The necessary prerequisites are: a proper organizational basis for the conduct of air transportation; a plan for the conduct of the service made by competent personnel; and an adequate financial resource.[20] The Court found the record barren of any substantial evidence, showing that Piedmont had met these tests with respect to the operation granted. In fact, there was evidence to the contrary.[21] The Board has failed to meet its own tests and it appears that the Court was correct in finding that the Board had acted in an arbitrary and capricious manner.

In so finding the Court has decided: that an air line must be an applicant for the route granted, that in order to be an applicant the application must be substantially directed toward the route awarded; and finally that the record before the court must show that the applicant was fit, willing, and able to perform the route awarded to it. This decision appears to be sound judicial treatment of an administrative determination. Unless the Supreme Court, which is now hearing oral argument on the case, decides that no application is necessary for the particular route granted and by so doing gives the broadest possible interpretation of Section 401(d)(1) of the Civil Aeronautics Act, the opinion of the court should be affirmed.[22]

ROBERT F. HANLEY*

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[18] See *Yakus* v. *U.S.*, 321 U.S. 414 (1943).

[19] 147 F.(2d) 152 (C.A.D.C. 1945).

[20] The route ultimately awarded to Piedmont was west of the Appalachians over mountainous terrain. Counsel for Piedmont in oral argument before the Board made statements with regard to the non-mountainous character of its application emphasizing its non-mountainous terrain. He also based all of his evidence and exhibits on the performance of a Noordvyn Norseman v. a single-engine plane, whereas State proposed to use twin engine planes.

[21] It is of interest to note that §10 of the Administrative Procedure Act states that reviewing courts are empowered to set aside agency actions, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion or not otherwise in accordance with law, and also those unsupported by substantial evidence. Unless the Supreme Court redefines the words in this section, it would appear that the Court's decision was correct.

[22] After this note had gone to press the Supreme Court, on February 6, 1950, delivered its opinion. It reversed the holding of the Court of Appeals for the District of Columbia discussed above. The majority held that it was not the Congressional purpose to bar the Board from granting any certificates in which the routes awarded deviate more than slightly from the precise routes defined in the application.

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BOOK REVIEWS

AIRLINE COMPETITION, by Frederick W. Gill and Gilbert L. Bates, Division of Research, Graduate School of Business Administration, Harvard University, Boston, Mass., 1949, pp. 631 and Appendices, $5.75.

This volume must be regarded as a highly important contribution to the all too meager literature of aviation economics.* Its size and the highly controversial subject with which it deals would alone entitle it to considerable attention. But in addition the extensive research conducted and the well supported conclusions drawn require respect for the study as the only thorough and unbiased appraisal of this subject.

The sub-title of the report, "A Study of the Effects of Competition on the Quality and Price of Airline Service and the Self-Sufficiency of the United States Domestic Airlines" is, in and of itself, a good summary of the project. The study was undertaken by the Harvard Business School during the latter part of 1947, as part of the School's over-all program of aviation research. The research was conducted during late 1947 and 1948 which were difficult and even desperate times for air transportation and from which there has now been a substantial recovery. A great deal of the data used throughout the report relates to 1947 and 1948. This is in no way a criticism of the report, but it does indicate that the conclusions which are drawn, particularly those relative to service and self-sufficiency, could scarcely have been based on data which was more unfavorable to the economic consequences of competition. Accordingly, the over-all conclusion of the report that airline competition has, with certain exceptions and under limitations, aided the development of the air transportation system must be regarded as conservative.

The report is divided into five sections, the first being in the nature of an introduction, accompanied by a factual account of the extent and growth of competition. Part II deals at length with the effect of increased competition on airline service to the public in such matters as types of equipment, frequency and quality of schedules, and passenger services. In brief, the conclusions are that competition has been an important determinant in the selection and improvement of equipment and that there is a general, but not universal, tendency for competition to improve the quantity and quality of schedules and service. The report points out, however, that the addition of a competitive carrier may cause, and frequently has caused, a deterioration of service and that this tendency is particularly true where additional competition is provided by a third or fourth carrier on a route.

Part III of the study is devoted to a series of "case" studies dealing with the effects of increased competition over various domestic route segments. The "cases" (not to be confused with CAB proceedings) serve primarily to illustrate points made either in the section dealing with service or in that dealing with self-sufficiency. Although of considerable interest to the student of air transportation, these cases serve primarily to illustrate the various shades of competitive situations in airline markets.

Part IV is devoted to a discussion of competition and its effect on airline prices (fares). The conclusions reached are that competition has been responsible, in major degree, for the relatively low level of airline fares, that third or fourth carriers certificated to compete over a route have usually not

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had any appreciable effect on the fare levels for that route, and finally that competition has been an important factor in the use by the airlines of various promotional schemes and special fares, such as Universal Air Travel Plan, Family Plan and the like.

The last section of the book, which is certainly the most controversial and in which the analysis and documentation is less convincing than in the balance of the book, involves an examination of the effects of airline competition on the self-sufficiency of the various carriers. The authors measure the relative self-sufficiency of the carriers (freedom from the need of government support) by calculating their so-called break-even need, that is, non-mail revenues as compared to total operating expenses per available seat mile and per revenue passenger mile. The fact that there is no satisfactory method of computing subsidy, as opposed to compensation for handling the mail, makes such an index necessary.[1] The report concludes that excessive competition explains in part the relatively poor post-war showing of the Big Three transcontinental carriers as compared to Eastern and accounts in major measure for the lack of self-sufficiency on the part of National, Northeast, Capital and Western. The other trunk-line carriers are found not to have had their self-sufficiency seriously impaired by competition.

The report concludes that a basically competitive air transportation system is in the public interest and that airline competition has had much to do with the rapid growth and development of the air transportation system. An important corollary of this theorem is, however, that competition can be a two-edged weapon and that it can retard growth and lead to uneconomic situations as well as serve as a developmental weapon. In sum, there is no necessary presumption for competition for competition's sake. Rather, the effects of competition in a given situation must be carefully appraised. This is particularly true in cases where it is proposed to increase competition, that is to certificate a third or a fourth carrier.

In commenting on the general findings of the report, it may be noted that while the Civil Aeronautics Board must certainly bear the brunt of any criticism which is leveled at the quantity and type of airline competition created, it has for some time recognized the existence in the air route pattern of uneconomic and destructive competition. Thus in late 1948, the Board instituted an investigation into the route pattern of National.[2] Early in 1949 the Board instituted route pattern investigations of Northeast and Western [3] and of selected route segments such as Washington-Chicago [4] to determine whether excessive competition existed and if so, what solution to this situation might be adopted. The findings of the Harvard study thus tend to support the desirability of this type of re-examination of the route pattern and suggest the need for an examination on an even broader basis.

It should be pointed out that over many of the route segments cited in the study as being excessively competitive, the Board has not certificated new carriers for the purpose of creating competition, but rather to accomplish other objectives, such as one-carrier service to points beyond a competitive point. For example, the study points out the destructive nature of the competition for Washington-Chicago traffic as between Capital, American, TWA and United. But neither of these last two carriers was certificated to Wash-

[1] In view of the recent interest in the mail pay separation subject, it is interesting to note that the authors hold the view that no satisfactory method of separating mail pay and subsidy can be developed in the absence of a fairly rigorous re-working of the carriers' accounting systems.

[2] Order Serial E-2025, September 28, 1948.

[3, 4] See Board's "Economic Program for 1949," released February 26, 1949. Also Order Serials E-2478, E-2479 and E-2480, February 21, 1949.

ington to provide additional competition on the Washington-Chicago segment. They were given an entry into Washington primarily to provide one-carrier service to Washington from points beyond Chicago on their respective systems. Although the basic reasons underlying certification do not invalidate the charge that there is excessive competition, they do indicate the inherent difficulties in correcting such situations. There may be a need for a reduction in competition over a given segment. That reduction must be made not by the simple expedient of rooting up one or more of the carriers, but rather of selecting the one to be removed with great care and perhaps of insisting on continued through service by interchange of equipment.

Two shortcomings of this excellent study may be noted. The first has to do with its excessive length and manner of presentation, which is due in part to the extensive introduction of statistical data in text form. (It should be mentioned that there is no paucity of tabular material either.) To a considerable extent the size of the volume is offset by summaries scattered liberally throughout the text at the end of sections, chapters and parts.

A second criticism goes to the research techniques used by the authors in approaching the problem. The impression given by the report is that the world of the airlines is not populated with people, but rather with statistics, schedules, city pairs and index numbers of self-sufficiency. Whatever advantages this septic approach to the problem may have in the way of objectivity, it completely ignores the fact that the airline world is in many respects highly personalized and subjective. Airline managements act and react differently from one another depending upon their "personalities." They therefore react differently to various competitive situations. There is little or no recognition of this fact in the study. And this is surprising since the Harvard Business School is a leading proponent of the internal-management case approach to business problems. It is difficult to escape the conclusion that at least the partial use of this method in the present study would have not only improved the final product but might well have led to significant conclusions on the differences in economic results of various types of competitive problems.

These criticisms do not, however, detract materially from the over-all competence and merit of this volume and its conclusions. There is no question that the industry, the interested government agencies, including the Civil Aeronautics Board, and students of air transportation, are greatly in debt to Messrs. Gill and Bates for their painstaking and careful study of airline competition.

PAUL W. CHERINGTON*

L'AVION CARGO, by Victor Serraz. (Published by Editions Internationales, Paris.)

Government officials, carrier executives, and others interested in the future of civil air transportation have long been concerned with the development of appropriate policies for the regulation of non-scheduled freight services. This volume is to be welcomed as a substantial contribution toward a better understanding of informed European thinking on the problem.

That "the cargo plane is only an instrument which utilizes the air to permit States to engage in commerce, and on this count, the ends that it pursues seem to disassociate themselves from every idea of prestige and every political concern" is the thesis of this provocative and well-written book by a distinguished French lawyer-economist. It is this essentially a-political character of the vehicle which demands that the technical and

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commercial problems facing air cargo development be solved without the interference of over-rigorous, over-zealous State regulation.

The statement of the thesis is prefaced by a detailed economic analysis, beginning with a description of the bewildering variety of transport aircraft in use today and of the expanded ground organization which must precede any development of air cargo. His examination of the rate determining process, largely on the basis of American data, concludes that the inevitably high standard of living of the cargo plane can be counterbalanced only by intensive exploitation of its advantages — and particularly its flexibility. The fundamental importance of return freight explains the author's insistence on the freedom desirable for the tramp plane, "the deliberate vagabond of the air," whose prototype should be the tramp ship of the merchant marine.

Commenting in a manner reminiscent of Parker van Zandt on the great currents of air economic geography, the author uses the Allied war experience in transportation to illustrate the zones of expansion now available for air cargo in the continents of the world. The argument then runs that if air cargo is to realize the development thus made possible, it must be free to create its own routes, subject only to the seasonal and local variations of its market. Present national legislation seems concerned only with submitting the non-scheduled carrier to a regime of concession or authorization for reasons of national prestige. However, because of their essential limitation only to regular air-line service, the different instruments of the Chicago Convention have by implication given a free road to the non-scheduled air carrier. The question of public international law posed by the cargo plane can and should be answered by an international statute of freedom.

Obviously, much of this plea for the non-scheduled air carrier is relevant to the conditions of American air transportation, and is of immediate interest to the American student. It should be added that the book is well documented, usually from American sources, with many maps and graphs, and altogether in the best spirit of what the French call "haute vulgarisation" — the dignified popular presentation of a complicated subject. Monsieur Serraz' book constitutes an excellent introduction to the work of the highly competent air-minded lawyer-economists identified with the authoritative French journal *Revue Generale de l'Air.*

LEONARD N. BECK*

PUBLIC FINANCE OF AIR TRANSPORTATION. A study of Taxation and Public Expenditures in relation to a Developing Industry, by Richard W. Lindholm. (The Bureau of Business Research, College of Commerce and Administration. The Ohio State University. 1948, XVII, 178 pp.)

The financial relations between the air transportation industry and the various levels of government are of such importance that every diligent attempt to offer a discussion of this topic is to be welcomed. After the spadework which has been undertaken by the Board of Investigation and Research in the reports on "Carrier Taxation" and on "Public Aids to Domestic Transportation" and by the Civil Aeronautics Board in the study on "Multiple Taxation of Air Commerce" it is desirable to follow up the ever changing developments in this field.

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Mr. Lindholm's book covers the events partly up to 1946 and presents an analysis of federal and state taxes as they affect the scheduled air carriers, of airport and airway financing and of other issues concerning public aids to air transportation. A great deal of statistical material offers useful information. The book is well written and keeps the attention of the reader. For those whose main interest is centered upon transportation it is revealing to follow the ways of reasoning of an economist whose particular field seems to be tax problems.

The concepts presented on airport financing appear to be sound. Most experts will agree that airport cost can more reasonably be recovered by fees than by taxation which cannot properly be adapted to the benefits received by the various airport users.

More difficult are the problems of recovering the federal outlays for airways. The book suggests to use for recovering these expenses a portion of the federal income taxes which the airlines pay. It is predicted that these taxes will rise considerably in the years following 1946 and that a part of the receipts can easily be made available for this purpose. All of us have overestimated the immediate postwar revenue and profit possibilities in air transportation and recent events have clearly indicated that airline profits are subject to changes in different periods. It appears, therefore, hardly advisable to rely on a tax based on such profits to provide for compensation for public aid items which are going up irrespective of airline profits.

It has often been suggested to utilize aviation fuel taxes as compensation for airway expenses. Mr. Lindholm points out that federal gasoline taxes did not cover these expenses in 1945. But the trend is toward assessment of new or higher taxes of this kind by the states. Mr. Lindholm feels that this is a undesirable development since gasoline comsumption is a good indicator for the use of airways for which the states are not responsible but not for airports. It is obvious that these considerations have a good deal of merit and that at least more could be said in favor of increasing aviation fuel taxation by the federal government than by the states.

In the field of property taxes, assessments upon real estate do not play any great role while those upon tangible property, particularly upon airplanes, have led to many controversies. In view of this situation, Mr. Lindholm suggests centralized national assessment of personal property taxes. Such a provision in future legislation would certainly avoid double taxation and promote simplification. However, our friends in the airline industry would not be too much satisfied with the suggested change since up to now tangible personal property is in many areas incompletely taxed or not taxed at all. The total receipts of personal property taxes are comparatively low, as shown in Table 2 in Appendix A of the book. I may add that this is due in part to the tax exemptions in the States of New York and Pennsylvania which account for a great portion of air traffic as well as in the State of Delaware which is the domicile of a large percentage of air carrier corporations.

Gross receipt taxes are often levied upon public utilities in lieu of general property or of income taxes. I agree with Mr. Lindholm's doubts on the advisability of adopting this method for taxation of airlines. I think that great reluctance is necessary in treating transportation corporations in financial matters like public utilities. The latter have usually much less difficulties to earn a fair return upon the value of their property than corporations engaged in transportation.

In discussing corporate net income and similar taxes Mr. Lindholm elaborates with great care on the fundamental issues of business taxation as

different from taxation of individuals. He recommends that every effort should be made to decrease the tax burden of new and developing industries. He also suggests that corporate income taxes should be based on the ratio between profits and growth rather than on net profits. It would be interesting to know the author's suggestions for such a tax structure.

The book rightly emphasizes that the airlines suffer tax disadvantages from the fact that their capitalization is primarily based on share capital. Their taxable net income includes the amounts to be paid out for dividends while corporations, such as the railroads, whose capitalization consists mainly of funded debts can deduct the interest payment from the taxable net income. This discrepancy exists in spite of the fact that dividends as well as interest are paid as compensation for investing money in the company. I may, however, mention that the ratio of long term debts to total airline capitalization has considerably increased in recent years and will probably increase further when the credit position of the airlines continues to improve.

Payroll taxes which represent a considerable part of carrier taxation are a consequence of the increasing interest of the community in the social welfare of the workers. It is true that, according to its inherent characteristics, this specific type of taxation is levied more or less like a contribution to an insurance organization and deviates from the basic principle which could be applied to taxation particularly from the fundamental requirement that the ability to pay be properly considered. In addition the levies will be higher in times of prosperity and lower in times of depression while the need for funds follows the opposite trend. Mr. Lindholm advocates as a remedy for these disadvantages a scheme for unemployment taxes whereby the federal government as a centralized agency would pay liberal unemployment benefits during a depression and decrease at the same time the amount of payroll tax collections. He emphasized, however, that within longer periods of cyclical trends total social benefits should not be higher than total taxes and that no reserves should be accumulated during prosperity periods. No doubt, such a solution would be highly desirable, but Mr. Lindholm does not tell how it can be accomplished without paying a part of the benefits out of other sources than payroll taxes. This is particularly true since we are still far from a reliable economic forecast which could be used for securing an equalization of tax receipts and benefit payments over long periods.

In the section on Air Mail Subsidy, Mr. Lindholm speaks of air mail as a luxury service. In my opinion air mail is at present such an integral part of our regular communication system as telegraph and telephones. However, I am in agreement with him, that the users should be charged according to the value of the air mail service. His suggestion that a surplus of air mail revenue over expenses be turned over by the Post Office Department to the Civil Aeronautics Administration will be strongly opposed by the Postmaster General, at least as long as there are deficits in other fields of the postal service. There are no objections against the author's adherence to the proposal, widely discussed in recent times, to separate air mail pay from subsidies. Such a step would facilitate the extension of public aid to non-scheduled air carriers which Mr. Lindholm also suggests.

A perusal of his findings and recommendations will stimulate transportation men to do some thinking of the effects which possible solutions in public finance of air transportation may have on the general transportation situation.

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